

## Internal Market Bill: Summary of Key Points for Northern Ireland

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**Main points of reference:** Clauses 40-46 of the [Internal Market Bill](#) (IMB), published on 9<sup>th</sup> September 2020. This summary focuses on four key areas within this.

### Unfettered Access

The UK Government [command paper](#) on the approach to implementing the Protocol on Ireland/Northern Ireland (PINI) highlighted that priority would be given to securing the Union as opposed to protecting Northern Ireland. This pointed towards there being more of an inclination against finding satisfactory arrangements with the EU than in favour of this.

The IMB seems to follow this line. However, with the intent of securing the UK's internal market, the IMB seeks to do this through reneging on commitments signed up to in the [Withdrawal Agreement](#) (WA). With the WA requiring a role for EU law in NI, it is not just a simple matter of changing requirements – there are consequences attached to this.

Whether these have been overlooked by the UK Government or are being downplayed is not yet clear – ultimately, publication of the bill could be a strategic move at a critical time for discussions between the UK and the EU on the details of the future relationship between the two.

<b>42</b>	<b>Power to disapply or modify export declarations and other exit procedures</b>	
(1)	A Minister of the Crown may by regulations make provision about the application of exit procedures to goods, or a description of goods, when moving from Northern Ireland to Great Britain.	30
(2)	That includes any exit procedure that is applicable by virtue of the Northern Ireland Protocol or otherwise.	
(3)	The following matters (in particular) may be taken into account when a Minister of the Crown is exercising the power conferred by subsection (1) –	35
	(a) the need for Northern Ireland goods to enjoy unfettered access to the rest of the United Kingdom, and	
	(b) the need to maintain and strengthen the integrity and smooth operation of the internal market in the United Kingdom.	40
(4)	Regulations under subsection (1) may (among other things) make provision –	
	(a) disapplying, or modifying the application of, an exit procedure;	
	(b) stating or restating what an exit procedure is, or is not, applicable to.	
(5)	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.	45

Clause 42 reinforces the position of the UK Gvt to take steps to ensure exit declarations are not necessary, contrary to what is required by the Protocol. This is also contrary to the EU law underpinning the requirement, given that GB will be an external state to the EU, while NI will, in effect and for the purposes of trade, remain part of the Single Market.

Conflicts with international law

The IMB makes it clear that domestic law in specific areas will take precedence over international law i.e. where there is a conflict, national law will prevail. This in itself is not a new legal concept. However, to intentionally act to produce legislation that will conflict with international law is an entirely different matter, and a hugely concerning one.

In this instance, it entails that the PINI requirements would be disregarded in areas covered by the IMB. Of particular note here are state aid and NI↔GB trade.

Clause 43 specifically addresses Article 10 of the PINI in relation to State aid.

<b>43</b>	<b>Regulations about Article 10 of the Northern Ireland Protocol</b>	
(1)	The Secretary of State may by regulations make provision for the purposes of domestic law in connection with Article 10 of the Northern Ireland Protocol (State aid).	20
(2)	Regulations under subsection (1) may (among other things) make provision –	
	(a) about the interpretation of Article 10;	
	(b) disapplying, or modifying the effect of, Article 10.	
(3)	Such provision may, for example, include provision for –	
	(a) aid not to be recovered except in accordance with the regulations;	25
	(b) persons to have no right of action of any sort or of a sort described in the regulations in respect of aid except in accordance with the regulations;	
	(c) the circumstances in which Article 10 is or is not to apply in relation to –	30
	(i) aid granted to persons in respect of activities outside Northern Ireland;	
	(ii) benefits which a person may derive from aid granted to or in respect of another person;	
	(d) Article 10 not to be interpreted –	35
	(i) in accordance with case law of the European Court;	
	(ii) in accordance with any legislative act of the EU, including regulations, directives and decisions, that would otherwise be binding on the United Kingdom;	
	(iii) otherwise than in accordance with the regulations;	40
	(e) 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.	
(4)	Regulations under subsection (1) –	45

This is considered to be one of the major challenges remaining to be solved in the EU-UK discussions. That it has been included in such clear terms in the IMB has been a notable cause for concern within the EU. It is difficult to see how this will help the talks to run any smoother at such a critical juncture in their progress.

Interpretation

Clause 45 of the IMB effectively provides direction for Courts in how to interpret laws passed within the scope of clauses 42 and 43. It outlines that these will take precedence, even where there is a conflict with international law. On initial reading, it seems that this might be a pre-emptive move to mitigate the potential for judicial review in these areas.

However, this bears the potential to present myriad challenges, not least for Northern Ireland, which will remain caught in the middle between the UK and the EU should this be contested. Any such

event would bring additional uncertainty and instability to businesses as well as politics within the region.

<b>45</b>	<b>Further provision related to sections 42 and 43 etc</b>	<b>25</b>
(1)	The following have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent –	
(a)	section 42;	
(b)	any regulations made under section 42(1);	
(c)	section 43;	30
(d)	any regulations made under section 43(1);	
(e)	this section;	
(f)	any other provision of this Act so far as relating to the provisions in paragraphs (a) to (e).	
(2)	Accordingly (among other things) –	35
(a)	regulations under section 42(1) or 43(1) are not to be regarded as unlawful on the grounds of any incompatibility or inconsistency with relevant international or domestic law;	
(b)	all rights, powers, liabilities, obligations, restrictions, remedies and procedures which are, in accordance with section 7A of the European Union (Withdrawal) Act 2018, to be recognised and available in domestic law, and enforced, allowed and followed accordingly, cease to be recognised and available in domestic law, or enforced, allowed and followed, so far and for as long as they are incompatible or	40

	inconsistent with a provision mentioned in paragraphs (a) to (f) of subsection (1);	
(c)	section 7C of that Act ceases to have effect so far and for as long as it would require any question as to the validity, meaning or effect of any relevant separation agreement law to be decided in a way which is incompatible or inconsistent with a provision mentioned in paragraphs (a) to (f) of subsection (1);	5
(d)	any other provision or rule of domestic law that is relevant international or domestic law ceases to have effect so far and for as long as it is incompatible or inconsistent with a provision mentioned in paragraphs (a) to (f) of subsection (1).	10

Devolution

Clause 46 outlines areas where the UK Government can take the lead for, broadly, the purposes of stabilising the internal market of the UK. However, there is overlap between these areas and devolved competences. Of particular concern for the devolved administrations has been that the UK Government will seize exiting the EU as an opportunity to encroach on these powers.

While the details are not yet clear on this front, the IMB seems to suggest that in balancing the challenges of the UK internal market with devolution, some aspects of devolution would have to be

compromised. The inevitable difficulty with any move like this is that it could extend to the potential disintegration of the UK. The Scottish independence movement has been central in voicing this concern to this, but increasingly figures within the Welsh administration have also been [vocal](#) about the potential for this.

<b>46</b>	<b>Power to provide financial assistance for economic development etc</b>	
(1)	<i>A Minister of the Crown may, out of money provided by Parliament, provide financial assistance to any person for, or in connection with, any of the following purposes –</i>	35
(a)	<i>promoting economic development in the United Kingdom or any area of the United Kingdom;</i>	
(b)	<i>providing infrastructure at places in the United Kingdom (including infrastructure in connection with any of the other purposes mentioned in this section);</i>	40
(c)	<i>supporting cultural activities, projects and events that the Minister considers directly or indirectly benefit the United Kingdom or particular areas of the United Kingdom;</i>	
(d)	<i>supporting activities, projects and events relating to sport that the Minister considers directly or indirectly benefit the United Kingdom or particular areas of the United Kingdom;</i>	45

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(e)	<i>supporting international educational and training activities and exchanges;</i>	
(f)	<i>supporting educational and training activities and exchanges within the United Kingdom.</i>	
(2)	<b>In this section –</b>	
	<b>“infrastructure” includes –</b>	5
(a)	<b>water, electricity, gas, telecommunications, sewerage or other services (for example, the provision of heat),</b>	
(b)	<b>railway facilities (including rolling stock), roads or other transport facilities,</b>	
(c)	<b>health, educational, cultural or sports facilities,</b>	10
(d)	<b>court or prison facilities, and</b>	
(e)	<b>housing;</b>	
	<b>“promoting”, in relation to economic development, includes taking any measure likely to contribute directly or indirectly to economic development (which might include, for example, measures relating to social inclusion);</b>	15
	<b>“providing”, in relation to infrastructure, includes acquiring, designing, constructing, converting, improving, operating and repairing infrastructure;</b>	
	<b>“sport” includes any physical recreation.</b>	20

### Further Analysis

- Colin Murray - <https://ukandeu.ac.uk/the-internal-market-bill-and-the-withdrawal-agreement/>
- Mark Elliott - <https://publiclawforeveryone.com/2020/09/09/the-internal-market-bill-a-perfect-constitutional-storm/>
- Kenneth Armstrong - <https://ukconstitutionallaw.org/2020/09/09/kenneth-armstrong-can-the-uk-breach-the-withdrawal-agreement-and-get-away-with-it-the-united-kingdom-internal-market-bill/>

Rolling analysis is also been available on the Performing Identities Twitter account  
[@performidentity](https://twitter.com/performidentity)