The Civil Society Brexit Project

Expert information and advice on Brexit for organisations in Scotland.

The UK Internal Market Bill: Legislation Briefing

Introduction

Although the UK left the European Union on 31 January 2020, the constitutional process of Brexit within the state is continuing. During the transition period lasting until 31 December 2020, the UK is still functionally part of the EU internal market, without any say in its rules. Much of the new domestic policies and legal frameworks to replace EU membership, once the transition expires, have yet to be put in place. The UK Internal Market Bill is intended to address many of these issues and it is a major development for Brexit and devolution. This legislation briefing explains the background to the UK internal market and the bill, the main provisions of the bill, its implications for devolution and the outlook for the bill.

Background: UK Internal Market

Brexit is such an emotive topic that sometimes the different sides do not even agree on the terms and definitions used. The idea of the 'UK internal market' is one of those contested concepts. While the UK Government is basing its entire plan for governing the economy on shaping the UK internal market, the Scottish Government rejects the whole suggestion that this internal market even exists as it is portrayed. Disputes aside, we can say that, generally speaking, the UK internal market is simply the economic space of the United Kingdom. Every state has its own economy, which could be called its 'internal market'.

When the UK was an EU member state (and, for now, during the transition period), the UK economy was part of the EU internal market. Governments and institutions in the UK applied the EU's laws and policies (the 'EU acquis') to enable the UK to function within that common EU market. The EU internal market needs the acquis to be able to operate, because it brings together all of the economies of the different member states. Being in the EU did not mean that the UK economy – its internal market – somehow ceased to exist in favour of the EU economy. In reality, the UK economy was part of the EU internal market, but it was still distinct in many respects.

Some of the EU's core economic principles reflect the dual nature between the European and state levels:

- The principle of harmonisation provides for the EU to set common internal market standards (often in technical and highly regulated areas).

- The principle of mutual recognition allows, in general, for products which satisfy one state's national regulations to be sold throughout the EU internal market.

It becomes clear then that national rules and national economies still matter in the EU. For the UK, the central question is how it will govern its economy after the transition, when it is no longer part of the EU internal market.

The UK's post-Brexit, post-transition governance will be shaped by two parallel processes. The first process is the negotiations between the EU and the UK on a future relationship. The objective of those negotiations is to reach a Free Trade Agreement plus cooperation in other areas. The profound differences between the two sides mean a no-deal outcome is plausible. While the EU would have been open to negotiating a closer relationship (such as the UK remaining in the EU single market), the UK chose to pursue a distant relationship. Therefore, even if a deal is reached, the new arrangements will be very different compared to EU membership and necessitate substantial change within the UK. The second process is the UK's domestic policy and legal choices. The Internal Market Bill makes decisions on some of those important choices.

UK Internal Market Bill

The UK Internal Market Bill is the UK Government's proposed centrepiece for managing and regulating the UK economy after the Brexit transition period. In advance of publishing the original bill, the UK Government released its UK Internal Market White Paper and conducted a four-week consultation. As introduced, the bill seeks to provide a foundation for the UK economy by shaping the UK internal market in a particular way. **At its core, it adopts a centralised approach and aims to ensure a high degree of regulatory conformity in practice across the four parts of the UK.** The bill will therefore have significant and wide-ranging implications for the political institutions of Scotland, Wales and Northern Ireland.

The provisions of the bill are opposed within the UK and indeed elsewhere. The Scottish Government and the Welsh Government have denounced the Internal Market Bill for its impact on devolution. The European Union believes that some of the measures related to Northern Ireland would breach the EU-UK Withdrawal Agreement and the Northern Ireland Protocol attached to it. These disagreements highlight the fact that different ways exist to manage the UK economy after Brexit – and that the approach set out in the Internal Market Bill is just one way. In particular, a model based on cooperation and coordination between the UK Government and devolved governments, instead of unilateral UK legislation, could have been pursued.

As it sets out in its white paper, the UK Government has adopted this more centralised approach because it wishes to ensure market efficiency and relative regulatory uniformity across the UK. It sees these objectives as being beneficial to economic growth. It also believes that creating this type of common trading space in the UK will make it easier to negotiate and implement bilateral trade agreements. Nevertheless, federal and multilevel states elsewhere in the world maintain their internal differences while still conducting external trade. The Internal Market Bill has seven parts, each of which is now explained in turn:

Part 1: Trade of Goods

The bill establishes two foundational UK market access principles for the sale of goods: mutual recognition and non-discrimination:

- Under the principle of mutual recognition, goods which meet the standards and regulations of one of the four parts of the UK (called the 'relevant requirements') can be sold throughout the UK, regardless of local standards.
- Under the principle of non-discrimination, goods from one part of the UK (with a 'relevant connection') cannot be disadvantaged directly or indirectly by another part of the UK in their ability to be sold based on their origin.

The second principle prohibits both direct discrimination (measures that intentionally disadvantage products from other parts of the UK) and indirect discrimination (measures that do not specifically target such products, but have a similar negative effect). These principles have evidently been adapted from EU concepts of the same names – though, in the EU context, non-discrimination (particularly on the basis of nationality) usually refers to people.

It should be noted that existing policies in place before the bill comes into force are exempt from these market access principles, but will be included if they are later substantively changed.

Nearly every conceivable good is covered by these UK market access principles. Exclusions are possible and set out in Schedule 1 of the bill, but they are extremely limited. The proposed exclusions focus primarily on protecting health in an emergency, and taxation. Policies do not fall under the requirements on indirect discrimination if they are necessary to pursue a 'legitimate aim' related to public safety, public security or public health. The principles also do not apply where a public body is carrying out its normal (non-commercial) duties.

Part 2: Trade of Services

The bill applies the same principles of mutual recognition and non-discrimination to the provision of services:

- Under mutual recognition, service providers who have the permission from one part of the UK to provide regulated services ('authorisation requirements') can provide those services throughout the UK, regardless of local obligations.
- Under non-discrimination, service providers from one part of the UK cannot be disadvantaged directly or indirectly by another part of the UK (through 'regulatory requirements') based on their origin. Service providers can still be required to register, notify or provide evidence of their authorisations in the local part of the UK.

Existing policies in place before the bill comes into force are exempt from these principles, unless they are later substantively changed.

A number of sectors are not covered by the principles. Exclusions are possible, either for mutual recognition or non-discrimination, and are set out in Schedule 2 of the bill. The proposed exclusions include financial, healthcare and transport services (both principles), legal services (mutual recognition) and water and waste services (non-discrimination). Policies do not fall under the requirements on direct discrimination if they are necessary to address a public health emergency, or on indirect discrimination to pursue a 'legitimate aim' related to public safety, public security, public health or the efficient administration of justice.

Part 3: Professional Qualifications

The bill allows for professional qualifications and experience issued or gained in one part of the UK to be recognised throughout the UK for the purposes of meeting the local requirements to practice a regulated profession. This rule however does not apply to continuing professional development, to existing professional requirements in place before the bill comes into force (unless they are later changed), or to legal professions.

Part 4: Monitoring of the Internal Market

The bill mandates the Competition and Markets Authority (CMA), the competition regulator, to monitor the functioning of the UK internal market. It was separately announced that an Office for the Internal Market will be established within the CMA to undertake these related tasks. The CMA will publish annual reports on the state of the UK internal market, and five-yearly reports on the effectiveness of the internal market principles for goods, services and professional qualifications, starting in March 2023. The UK Government or devolved governments can ask the CMA to analyse proposed or actual regulations from one part of the UK for their effects on the internal market. While the CMA will have powers to obtain information, its reports and recommendations will be not be binding.

Part 5: Northern Ireland

The bill seeks to define how the Northern Ireland Protocol is implemented by the UK. Under the Protocol, Northern Ireland will remain aligned to aspects of the EU internal market for goods and some customs rules, even after the transition ends. This alignment will continue until an EU-UK agreement which renders them unnecessary is reached (if ever). These measures, agreed between the EU and the UK, are designed to avoid the return of a material border on the island of Ireland. The absence of a border at present is a cornerstone of the peace process, made possible by the Good Friday/Belfast Agreement and common EU membership. Northern Ireland has been one of the EU's top three priorities throughout the Brexit process, and the Protocol is a delicate compromise to keep this border open.

The rules of the UK internal market would therefore apply differently in Northern Ireland, in line with the provisions of the Protocol. Nevertheless, the bill requires all public authorities in the UK, including devolved governments, to consider how to further Northern Ireland's place in the UK internal market when implementing the Protocol. More directly, the bill allows the UK Government to unilaterally ignore the terms of the Protocol on customs declarations from Northern Ireland to the rest of the UK and on notifications to the EU of state aid decisions related to Northern Ireland. These provisions are the most contentious aspects of the bill. The EU believes that these measures breach the terms of the Withdrawal Agreement and wants them removed. The UK Government admits that the measures breach the Agreement, but it argues that the UK Parliament has the right to do so. If this dispute is not resolved, the EU might pursue legal action against the UK at the EU Court of Justice or invoke international arbitration.

Part 6: Funding in the UK

The bill empowers the UK Government to spend public money on a wide range of areas. It will be able to finance projects that are related to economic development, infrastructure, education, training, exchanges, culture and sport. These powers are not directly connected to the functioning of the UK internal market. Many of the affected areas are also devolved. The UK Government will therefore be able to fund organisations and individuals directly and bypass devolved governments. It had announced several years ago that it intends to establish a 'UK Shared Prosperity Fund' to replace EU structural and investment funding in the UK. The Shared Prosperity Fund could be the primary means for this new UK spending.

Part 7: State Aid and Other Provisions

The bill makes state aid (government assistance to businesses or organisations which could distort competition) reserved to Westminster for Scotland and Wales and an excepted matter for Northern Ireland. As stated in its Internal Market White Paper, the UK Government believes that state aid under the EU definition is already reserved, but that it is seeking this new reservation for legal certainty. In its response to the white paper, the Scottish Government argues that subsidies are currently a devolved matter and it opposes this new reservation. The bill also makes itself a 'protected enactment', which prevents it from being modified by devolved legislation or separate UK secondary legislation.

Implications for Devolution

The UK Internal Market Bill has major implications for devolution. Through the bill and its wider approach to the UK internal market, the UK Government intends to create a common trading space across the UK and to reduce and prevent what it believes to be regulatory burdens for business. While the focus of debate is primarily on economics and trade, the bill has the potential to impact any policy which is said to be connected to the UK internal market. The powers and responsibilities of the Scottish Parliament and Government will therefore be affected in significant ways.

Under the UK internal market, devolved legislation could be limited in practice by the new market access principles. For instance, Scottish Parliament or Government social, labour or environmental policies that are considered to negatively impact the UK internal market would not apply to businesses, organisations or individuals from the rest of the UK. Such policies would still apply however to those within Scotland. For instance, even if Scottish food production standards were higher, food produced to lower standards elsewhere in the UK or abroad could still be sold in Scotland. **The 'lowest common standard' in any part of the UK would in that sense become the standard for the whole UK.**

Distinctly Scottish policies could therefore be undermined and become unworkable. The picture could be confusing, since Scottish standards would exist, but they would not have to be followed by everyone. Scottish institutions might decide not to introduce particular new policies, or change them from what they would have been, because they would only apply locally. For instance, regulations designed to achieve environmental goals could end up disadvantaging Scottish businesses, because other UK businesses might not have to meet those standards and could avoid incurring the related costs. The end result could be that those regulations are not pursued to avoid that outcome.

Existing devolved policies in place before the bill comes into force will not be affected by the UK internal market requirements, as long as they are not substantially changed. For instance, minimum pricing for alcohol in Scotland can continue to operate as it does now, since that policy has already been enacted. However, if the Scottish Parliament were to pass new legislation to alter the minimum unit pricing, it would from that point start to be affected by the market access principles. As a result, Scottish institutions might to decide to 'freeze' existing policies, even if they wanted to update them, so that the policies could be kept outside the scope of the UK internal market. Freezing policies could mean that they are less effective than they otherwise would be, since they cannot be improved.

New devolved policies and devolved policy innovations, such as on food labelling or plastic bottle returns, will be impacted by the UK internal market principles. An inherent imbalance exists in the fact that the UK Government acts both for England and the whole UK. In practice, UK Government policies and UK Parliament legislation for England in devolved areas related to the internal market would have in some sense the automatic effect of being UK-wide policies. This imbalance could put pressure on devolved institutions to seek to agree common UK approaches, even when they would prefer to develop their own, at the risk of being otherwise overridden. **In any case, future devolved policies will exist under the uncertainty that they could be counteracted at any time by policy decisions elsewhere in the UK**.

As it stands, the bill does not prevent devolved legislatures from passing legislation within their powers which relates to the UK internal market. The bill will not in that sense make such devolved laws invalid or outwith their competence. Instead, the bill limits the extent to which they have any practical force. For instance, businesses from other parts of the UK could simply ignore any requirements from Scottish legislation which are contrary to the UK internal market principles. The bill charges the CMA with providing advice and analysis, but gives it no enforcement powers. It will not, for instance, have a role of approving or rejecting proposed devolved legislation based on its perceived impact on the UK internal market. However, the UK Government may want to develop enforcement systems in future.

The funding powers which the bill gives the UK Government to spend in devolved areas will also have an impact on devolution. In response to these provisions, the finance ministers of Scotland, Wales and Northern Ireland have stated that this approach would undermine their work. Different spending priorities by the UK Government and devolved governments could lead to clashing policies. For instance, the UK Government could decide to fund an infrastructure project – such as a road, bridge, hospital or school – which the Scottish Government believed did not fit with its Programme for Government or with its specific goals in that case, such as economic development, transport connectivity or environmental protection. On both devolved policy-making and spending, the bill will bring major change.

Outlook for the Bill

With the UK Government's large majority in the House of Commons, the Internal Market Bill should have been expected to pass relatively easily through the UK Parliament. However, its provisions related to the Northern Ireland Protocol have caused widespread concern and added uncertainty to its passage. A partial change to the Northern Ireland provisions is reportedly likely. It should be noted that, within Westminster, concerns about the bill's impact on devolution are much less pronounced. Since the bill (substantially) concerns devolved competences, the legislative consent procedure has been activated. The Scottish Government announced before the bill was even published that it would recommend that the Scottish Parliament not consent to it. Nevertheless, the full expectation is that the UK Parliament will pass the Internal Market Bill, whatever the opinion of devolved legislatures.

The UK Internal Market Bill will define the economic governance of the UK after the Brexit transition period, and it will reshape the system of devolution as a result. Given that the purpose of devolution to Scotland, Wales and Northern Ireland is to enable decisions to be made closer to the people who live there, the question now being tested is to what extent the policies of devolved legislatures and governments should be limited by economic principles and standards decided by the UK Parliament and Government. Beyond the bill, this debate on devolution and the constitution will continue for some time to come.

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