



## September 2020

Following weekend [press reports](#) on the 6 September 2020 that the UK Government planned to use the forthcoming Internal Market Bill to deviate from the EU/UK Withdrawal Agreement, Theresa May MP tabled an urgent question to the Secretary of State for Northern Ireland Brandon Lewis MP in the House of Commons on Tuesday 8th September, to seek clarification on these rumours. After several questions from various MPs, the Secretary of State finally admitted in a candid response to Sir Robert Neil MP that the Government were indeed planning on breaking international law:

***'yes, this does break international law in a very specific and limited way. We are taking the power to disapply the EU law concept of direct effect, required by article 4, in certain very tightly defined circumstances.'***

Many organisations and stakeholders from Northern Ireland were quick to highlight the [dangers](#) of such an approach given that operation of the Withdrawal Agreement and the Northern Ireland/Ireland Protocol are contingent upon mutual adherence with the Agreement's provisions under international law by both the United Kingdom and the European Union.

The full text of the [United Kingdom Internal Market Bill](#) itself was then published on the 9 September 2020 and has added to wider public, political and civil society concerns regarding the future of the EU/UK Withdrawal Agreement, NI/Ireland Protocol and the potential impacts for the Belfast/Good Friday Agreement in Northern Ireland.

There are two areas of the Northern Ireland Protocol that the Internal Market Bill seems specifically designed to undermine. The use of exit summary declarations for goods going from Northern Ireland to the rest of the UK and the limitations placed on the provision of state aid within Northern Ireland.

### Exit Summary Declarations

Exit summary declarations are a normal part of the operation of the EU Customs Union. It is a means of letting the customs authority know that goods are to be taken out of the customs union territory.

Current EU Member states use these declarations for goods moving out of the union to non-member/non-EU countries. To avoid customs divergence on the island of Ireland, the UK and EU agreed that Northern Ireland would remain part of the UK Customs territory but would apply EU Customs territory rules. This includes, in Article 5, section 4<sup>1</sup> of the NI Protocol and further detailed in Annex 2.1<sup>2</sup> the use of exit summary declarations<sup>3</sup> for goods moving from Northern Ireland to other parts of the UK.

Article 6 of the Protocol went on to provide that Northern Ireland goods should not be hindered from being placed on the UK market provided they were in technical compliance with those same principles of the union customs code.

***‘Provisions of Union law made applicable by this Protocol which prohibit or restrict the exportation of goods shall only be applied to trade between Northern Ireland and other parts of the United Kingdom to the extent strictly required by any international obligations of the Union’***

Indeed section 6.2 goes on to state that the UK and EU shall use their *‘best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom, in accordance with applicable legislation and taking into account their respective regulatory regimes’*. The Joint Committee, the body set up and consisting of EU and UK representatives to ensure the implementation and operation of the Agreement, was also designated with adopting *‘appropriate recommendations with a view to avoiding controls at the ports and airports of Northern Ireland to the extent possible’*.<sup>4</sup>

So, while the detailed operation of the exit summaries would have required further agreement within the Joint Committee it was clearly the body envisaged under the Withdrawal Agreement as making those collective decisions. The provisions of the Internal Market Bill are now clearly at odds with that approach. Section 42 of the Bill would create new powers for the UK Government to disapply or modify export declarations and other exit procedures as they are currently envisaged under the Withdrawal Agreement.<sup>5</sup> In a direct attempt to break with the International Law restrictions of the Withdrawal Agreement covering this provision the text also states that any regulations made by UK Ministers to enact this *‘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.’*

---

<sup>1</sup>[Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community \(2019/C 384 I/01\)](#), Article 5(4). The provisions of Union law listed in Annex 2 to this Protocol shall also apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland. Pg.95

<sup>2</sup> [Annex 2 Provisions of Union Law Referred to in Article 5\(4\) 1](#). General customs aspects (1) — Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

<sup>3</sup> [Regulation \(EU\) No 952/2013](#), (10) "exit summary declaration" means the act whereby a person informs the customs authorities, in the prescribed form and manner and within a specific time-limit, that goods are to be taken out of the customs territory of the Union;

<sup>4</sup> [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community \(2019/C 384 I/01\)](#), Article 6(1), Pg. 96.

<sup>5</sup> [United Kingdom Internal Market Bill](#), 42 (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. (2) That includes any exit procedure that is applicable by virtue of the Northern Ireland Protocol or otherwise. Pg. 37

## State Aid

State aid is any advantage granted by the Government or public authorities *‘through state resources on a selective basis to any organisations that could potentially distort competition and trade in the European Union (EU)’*<sup>6</sup>. Section 10 of the Withdrawal Agreement set out that any state aid in Northern Ireland would be subject to the same rules of state aid currently in operation for EU member states under union law.<sup>7</sup> Clearly this rule was detailed within the Agreement to ensure that as Northern Ireland continues to operate within the Single Market that any section of its economy does not benefit from any advantage granted by public authorities that may give it a commercial advantage over other regions of the Single Market, including the Republic of Ireland.

Section 43 of the Internal Market Bill now in contrast sets out that the Secretary of State will be allowed to make regulations that interpret, disapply or modify the effect of Article 10 of the Northern Ireland Protocol or allow it to be interpreted in line with EU law, judgments of the European Court or any relevant international or domestic law.<sup>8</sup>

As [Colin Murray](#) highlights, the UK Government may not well have realised that the state aid provisions *‘extend beyond Northern Ireland and apply, for example, to component parts manufactured in Great Britain’* but that such restrictions on state aid are a well-established element of maintaining the level playing field provisions of the Single Market.<sup>9</sup>

A third protection of these Customs and Single Market protections in the Protocol is the requirement for tariffs to be paid on any *‘at risk goods’* that may enter Northern Ireland from GB. These are goods that originate in GB but may be at risk of moving beyond Northern Ireland and entering the wider EU market. Again, the identification of what might be designated as an *‘at risk good’* is complicated and was designated under the protocol as a task for the Joint Committee to decide before the end of the transition period. While there are no changes mentioned in the Internal Market Bill to the current agreement on at risk goods, it now seems likely that the UK Government will seek to similarly undermine this provision in the autumn finance bill, which is used to write the chancellor’s Budget into law.

The cumulative impact of these three measures, if passed into law, will be to directly and consciously undermine existing agreements established in International Law between the EU and UK and further protected in domestic UK law.

## International Law

Not only do sections 42 and 43 of the Internal Market Bill break away from the exit summary declarations and state aid commitments specifically made by the UK Government in Articles 5 & 10 of the NI Protocol but section 45 further reinforces this break with international law.

---

<sup>6</sup> [State Aid Guidance, Department of Business, Energy and Industrial Strategy](#), 2012

<sup>7</sup> [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community \(2019/C 384 I/01\)](#), Article 10, Pg. 98 & Annex 5, Pg. 129

<sup>8</sup> [United Kingdom Internal Market Bill](#), 43 (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). (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. Pg.38

<sup>9</sup> [The Internal Market Bill and the Withdrawal Agreement](#), Dr Colin Murray, UK in a Changing Europe, 8 September 2020

Section 45<sup>10</sup> states that the provisions in sections 42 and 43 ‘have effect *notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent*’. Section 45(4) expands on this to explain that “relevant international or domestic law” includes—

- (a) any provision of the Northern Ireland Protocol;
- (b) any other provision of the EU withdrawal agreement;
- (c) any other EU law or international law;
- (d) any provision of the European Communities Act 1972;
- (e) any provision of the European Union (Withdrawal) Act 2018;
- (f) any retained EU law or relevant separation agreement law;
- (g) any other legislation, convention or rule of international or domestic law whatsoever, including any order, judgment or decision of the European Court or of any other court or tribunal.

This is widely considered to be an unprecedented move by the UK Government and it is clearly at odds with established international practice as regards the rule of law and inter-state obligations in regard to international treaties.<sup>11</sup> Section 45 attempts to undermine the principle in Article 4 of the Withdrawal Agreement (and given domestic implementation in section 7a of the EU Withdrawal Bill) that the provisions of the Agreement and Protocol will have direct effect in UK domestic law.

In a further move Section 49(4) (‘No power to make subordinate legislation contained in primary legislation passed or made before this section comes into force may be exercised so as to amend, repeal or otherwise modify the operation of this Act’) will add the future internal markets act to the Northern Ireland Act (NIA) so that the Northern Ireland Assembly (which is obliged to act compatibly with the NIA) is not able to amend how the IM act plays out in Northern Ireland.

These unilateral moves to undermine significant elements of the Withdrawal Agreement and Protocol have been met with wide scale criticism and are likely to have substantial, if yet unpredictable, consequences for the future of the Withdrawal Agreement and the outcome of ongoing EU/UK Free Trade negotiations.<sup>12</sup>

### **Belfast/Good Friday Agreement**

In response to criticism of these proposals the Prime Minister Boris Johnson responded at Prime Ministers Question Time by saying that the Internal Market proposals were designed to protect the Belfast/Good Friday Agreement and NI peace process.

***‘We need a legal safety net to protect our country against extreme or irrational interpretations of the Protocol which could lead to a border down the Irish Sea which I believe...would be prejudicial to the interests of the Good Friday Agreement and prejudicial to the interests of peace in our country.’***

While the avoidance of any provisions that differentiated Northern Ireland from the rest of the UK would clearly be beneficial from the perspective of maintaining wider Strand 2 East-West elements of the Belfast Agreement and may decrease some of the anxieties within unionist communities, there is little evidence to suggest that the Withdrawal Agreement and NI Protocol provisions

---

<sup>10</sup> Ibid, Pg. 39

<sup>11</sup> However, it should be pointed out that significant elements of the Belfast/Good Friday Agreement and subsequent inter-governmental agreements relating to the peace process in Northern Ireland have remained unimplemented by successive UK Governments.

<sup>12</sup> [EU considers legal action as UK unpicks Brexit deal](#), Telegraph, 9 September 2020

addressed in the Internal Market Bill would undermine the Belfast Agreement or the peace process in Northern Ireland.

The exit summary declarations, state aid commitments and the direct effect of the Withdrawal Agreement and Protocol in UK domestic law were elements of a wider deal specifically designed to remove the most prominent threat to the peace process in Northern Ireland – the creation of a hard border on the island of Ireland. Which would have almost certainly been the default outcome in the absence of the Withdrawal Agreement being reached in 2019. The existence and protections of common EU regulatory alignment and community law on both sides of the Irish border had played a significant role in cementing the Strand 2 North-South cooperation elements of the Belfast Agreement, important economic factors like the creation of the all-island economy and the enhancement of human rights protections amongst other developments. It is also essential to remember that the Withdrawal Agreement and Protocol arrangements for Northern Ireland were ‘front stop’ provisions intended to endure regardless of the outcome of future EU/UK trade discussions and not an interim measure designed to cover the gap until the end of the transition period. The UK’s claim that the Internal Market breaches the Withdrawal Agreement/Protocol precisely to protect the Belfast/Good Friday Agreement is unsupported by evidence and does not hold up in light of the substantive and detailed negotiations on this issue since 2017.

## **Business**

It is understandable that businesses will seek to ensure unfettered access for Northern Ireland goods in the wider UK market. While the Internal Market Bill proposes measures and deviations from previous agreements (as outlined above) to ensure such access to the UK Internal Market, it is clearly not an approach that is without consequences for businesses and the wider economy. The EU are distinctly protective of the Single Market and Customs Union as the main economic drivers and benefits of EU membership. To maintain the integrity of that market whilst simultaneously giving Northern Ireland access, they have consistently outlined the requirement for Northern Ireland to abide by these rules – hence the provisions in the Withdrawal Agreement/Protocol. These demands have also been replicated and requested from the UK during the current negotiations on a Future EU/UK Free Trade Agreement in which the UK hopes to achieve unfettered access to the Single Market.

The actions of the UK Government under the Internal Market Bill directly undermine those EU attempts to maintain the integrity of the Single Market and Customs Union as it applies to Northern Ireland. The impact of these manoeuvres on Northern Ireland are therefore unlikely to be benign. The worst case scenarios being that the future of the Withdrawal Agreement and therefore Northern Ireland’s access to the Single Market and Customs Union are jeopardised (creating a hard border) and/or that no Free Trade Agreement is reached between the UK and the EU.<sup>13</sup> This would likely have a devastating impact on all island economy, cross border trade and border communities. It now also seems likely that the prospect of a UK/US trade deal will be even more difficult if the UK maintains this approach to the Withdrawal Agreement and Protocol, thus having further negative impacts on the economy of Northern Ireland and the UK.<sup>14</sup>

---

<sup>13</sup> Initial [legal advice](#) circulated amongst EU Members States suggests that this could be a potential outcome if the UK did not ultimately comply with any judgement in case taken on this issue before the ECJ.

<sup>14</sup> [No US-UK trade deal if agreement is threatened](#), BBC News NI, 10 September 2020

## Human Rights

If, as seems to be the case under the Internal Market Bill, that the UK Government's commitment to International Law is expendable, then it also gives rise to the question of what is to stop specific human rights protections in the Withdrawal Agreement and Protocol also being undermined?

The protocol commits to the non-diminution of rights in Article 2.1. Despite some recent [reassurances](#)<sup>15</sup> on the operation of the dedicated mechanisms and the inclusion of legislation in the EU Withdrawal Act to give them effect, there would be no reason to believe, given this latest move, that the UK Government would not seek to undermine this International Agreement or domestic legislation again if the non-diminution of rights principle should at some point in the future interfere with other political priorities.

To violate the UK's adherence to International Law to achieve quite limited economic and political impacts is a clearly worrying development that undermines the credibility of the UK on the international stage. The rules-based system of the EU's Single Market and Customs Union have played an integral role in dragging human rights compliance forward in Northern Ireland in recent decades. Any regression of existing commitments in the Withdrawal Agreement and NI/Ireland Protocol would therefore jeopardise that wider Agreement and set of relationships that continues to be fundamental to the protection of human rights locally.

## Devolution

As we previously outlined in our consultation [submission](#)<sup>16</sup> on the Internal Market White Paper there are also clear concerns about the impact that aspects of the Internal Market Bill will have on the operation and autonomy of devolved Government and institutions.<sup>17</sup>

The principle of Mutual Recognition in the Internal Market Bill *'to ensure that compliance with regulation in one territory is recognised as compliance in another'* may on face value seem to be an innocuous provision. However, this approach fails to take account of the emerging repatriated EU powers to devolved authorities, how those powers differ across the devolved regions of the UK or how devolved autonomy might best be respected and maintained. The provisions seem to suggest a legislative 'one size fits all framework' that does not allow for deviation of standards across the UK. While that may seem sensible for maintaining a coherent UK wide market for goods there are genuine concerns across the devolved regions that this may represent a power grab from devolved authorities, limit the scope for innovation from devolved parliaments/assemblies and fire the starting gun on a forced push to the bottom for important social and economic standards.

## Summary

The move by the UK Government in the Internal Market Bill to violate International Law by undermining elements of the EU/UK Withdrawal Agreement, the Northern Ireland/Ireland Protocol and the EU Withdrawal Act is a disturbing and destructive development. Undermining elements of those existing agreements risks jeopardising the wider agreement, the associated protections for Northern Ireland and opens the door for unilateral moves to undermine associated human rights protections for Northern Ireland. If the UK Government continues with these proposals the impacts

---

<sup>15</sup> [Information about the UK Government's commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland](#), Northern Ireland Office, August 2020

<sup>16</sup> [HRC Submission - UK Internal Market Consultation](#), August 2020

<sup>17</sup> <https://twitter.com/Channel4News/status/1303767321610256390?s=20>  
<https://twitter.com/petermacmahon/status/1303708766802718722?s=20>

for Northern Ireland as we approach the end of the transition period are undoubtedly damaging and set us on a pathway to conflict with the EU.

Human Rights Consortium

[info@humanrightsconsortium.org](mailto:info@humanrightsconsortium.org)

[www.humanrightsconsortium.org](http://www.humanrightsconsortium.org)

