

The Internal Market Bill – an overview

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Introduction

The United Kingdom Internal Market Bill was introduced in the House of Commons on 09 September 2020 (the Bill), provoking much debate and attracting criticism from many. But what exactly is contained within the Bill? Here we summarise its key elements and explain why certain aspects are proving to be controversial.

In summary

The Bill aims to become the Internal Market Act (the Act), which will preserve the UK internal market by limiting the regulations determined by each devolved administration (in Scotland, Wales and Northern Ireland (NI)), ensuring that businesses can continue to trade freely across the UK as they currently do. It contains provisions in connection with:

- goods and services;
- recognition of professional and other qualifications;
- the creation of new functions for the Competition and Markets Authority (CMA);
- measures which seek to clarify elements of the Protocol on Ireland/Northern Ireland (Protocol) in domestic law (concerning tariffs, export procedures and state aid);
- ensuring a uniform approach to the application of state aid law under Article 10 of the Protocol;
- powers for the UK government to provide financial assistance for a number of purposes across the whole of the UK; and
- reserving subsidy control to UK government.

Why is such a piece of legislation deemed necessary by the UK government?

Much of the regulation in these areas currently comes from EU law, collectively binding all UK nations, and this will cease to apply once the transition period ends on 31 December 2020. Once this regulation currently exercised at an EU level falls away, the devolved governments will have the power to make their own laws to govern such issues. In this context, it is important to understand that the devolved nations have the power to legislate in all areas except those which are reserved matters of public policy (such as defence) i.e. reserved matters are powers which are retained by UK government and carved out of the devolved administrations' legislative competence. As such, without specific intervention, this leaves the potential for policy differentiation across different parts of the UK, which some argue could hinder free trade across the UK nations.

However, the approach being taken is not endorsed by the Scottish and Welsh governments, which would prefer to manage such matters through "common frameworks". Under these frameworks, the power to legislate in these areas would vest with the devolved administrations, but all 4 nations' governments would agree common principles as to how they will work together.

What does the Bill say?

Clauses 1 to 21 (inclusive) and Schedules 1 and 2 of the Bill deal with market access for goods and services, enshrining the concepts of mutual recognition and non-discrimination. In brief, if goods can be sold legally in one part of the UK then they can be sold legally in any part of the UK, and if one part of the UK passes legislation that discriminates against goods from another part, that legislation will have no effect. Similarly, with services, this will remove the need for providers to be authorised separately for each nation. However, some services are excluded (e.g. broadcasting and financial), and there are exceptions (e.g. practising lawyers in Scotland will still require the relevant Scots Law qualification).

Clauses 22-27 aim to ensure that a professional qualification obtained in one part of the UK is automatically recognised in other parts of the UK, allowing individuals to work more freely between the different nations without the need to requalify, subject to some exceptions.

Clause 28-39 relate to the creation of an Office for the Internal Market (OIM) and certain information gathering powers it will possess. The OIM will be within the CMA and will be tasked with the monitoring of the internal market, reporting on its functioning and efficacy. However, its powers will be limited - even if it identifies that a particular devolved administration has passed regulations which have a detrimental impact on the internal market, there will be no obligation on that government to act on the OIM's findings.

Clauses 40 and 41 aim to ensure that NI's businesses will enjoy "unfettered access" to the UK internal market. When implementing the Protocol, all UK authorities are to have the "highest possible regard" to NI's place in the internal market. The creation of new checks, controls or administrative processes on the movement of goods between NI and GB will be prevented.

Clauses 42 provides a power to disapply or modify the requirement for export declarations for goods moving from NI to GB. This is a requirement under EU customs rules, which apply to NI under the Protocol, and something which the UK government is currently seeking exemption from. Nonetheless, if an exemption is not agreed, then under this provision the requirement can be removed unilaterally by the UK government.

Clauses 43 and 44 relate to EU state aid rules and NI. Under the Protocol (Article 10 and Annex 5), EU state aid law will apply in relation to trade in goods and electricity between NI and the EU. However, the provisions of the Protocol have the potential to apply UK wide, something which the UK government wishes to avoid. Therefore, clause 43 permits the UK government to create regulations to determine how the Article 10 is to be applied, which may include its interpretation, disapplication or modification.

Clause 45(1) reinforces the efficacy of clauses 42 and 43. Notwithstanding any incompatibility with relevant domestic or international law, these sections, and any regulations made under them, will have legal effect. Essentially, provisions 42 and 43 will have legal effect regardless of them being at odds with the EU-UK Withdrawal Agreement (WA) and the European Union (Withdrawal Agreement) Act 2020. Moreover, clause 45(2) of the Bill stipulates that regulations made under 42 and 43 "are not to be regarded as unlawful on the grounds of any incompatibility or inconsistency with relevant international or domestic law".

Clauses 46 and 47 afford the UK government the power to make payments for the purposes of promoting economic development, providing infrastructure in the UK, supporting cultural and sporting activities, projects and events, and supporting international and domestic education and training activities and exchanges.

Clause 48 deals with state aid and clarifies that subsidy control or state aid powers are reserved matters and can only be administered by the UK government. This is a specific area where both the Scottish and Welsh governments have expressed their concern, with some arguing that state aid is a devolved matter.

Clause 49 provides that the Act will be a protected enactment. Therefore, the devolved governments will not be able to undermine the Act through the passing of their own legislation. Furthermore, the UK government would be required to pass new, primary legislation if it wishes to override its provisions.

Clauses 50-54 include general provisions, tackling disapplication of certain elements once they are no longer required, the creation of regulations under the Act, and interpretation.

Controversy

In addition to more general issues raised by the devolved administrations, clauses 42-45 (those relating to the Protocol and its application) have proven to be particularly controversial aspects of the Bill, sparking much debate and cross-party criticism. It is these provisions which have instigated some to suggest that the Bill will break international law, including NI Secretary Brandon Lewis, albeit in a "very specific and limited way". Concerns have also been raised over the issue of trust and how such a move has the potential to damage the UK's reputation in a global trade deal context.

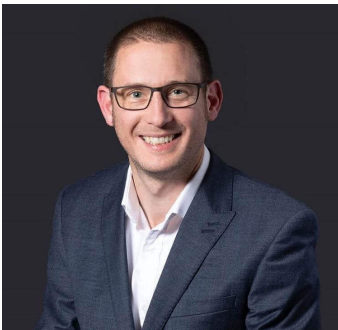
Nonetheless, the WA is an international treaty and the EU will expect the UK to implement it in its entirety. The publication of the Bill prompted the EU to request an extraordinary meeting of the Joint Committee which oversees the implementation of the WA, and it has been reported that the EU have given the UK government until the end of September to drop their plans or risk jeopardising trade talks. Furthermore, the potential exists for the judiciary to rule on the legality of such provisions. It could be that the Supreme Court is asked to determine whether such an approach can actually be adopted by the UK government.

Conclusion

The Bill is currently only at its early stages of debate. It is yet to pass through the House of Commons and will then need to pass through the House of Lords. Given the level of cross-party criticism it has already attracted, it is hard to see that this path will be either smooth or expeditious. And there is much scope for it to undergo amendments prior to its enactment, something which may prove necessary if it is indeed to be approved by both Houses and move to receiving Royal Assent.

We will be watching its progress closely.

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