

# A Barrier against the new incoming tide? The UK Internal Market Bill and Dispute Resolution under the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland (23 September update)

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## Brexit déjà vu

On 14 September 2020, the [United Kingdom Internal Market Bill \('UKIMB' or 'the Bill'\)](#) [passed at Second Reading in the House of Commons](#). The Bill is currently in Committee stage in the House of Commons, before its passage to the House of Lords. The political tension caused by the UK government's attempt to switch off the direct effect of the Withdrawal Agreement in the Bill bears a striking similarity to battles over the [European Union \(No.2\) Act 2019 \('The Benn-Burt Act'\)](#). In autumn 2019, the Prime Minister [flirted with not complying with a domestic law](#) that required him to request that the European Council extend the Article 50 period. In autumn 2020, the government has moved a Bill that states explicitly that certain of its clauses will 'have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent' ([Clause 45](#)). Both chapters of the Brexit drama have [prompted concern](#) over whether the UK government's commitment to the Rule of Law is entirely watertight.

This contribution will step back from the [noise of the political debate](#). It attempts to provide a doctrinal legal analysis of the compatibility of the UK Internal Market Bill with the Withdrawal Agreement. Section 1 briefly considers whether clauses 42, 43 and 45 of the Internal Market Bill, if and when Royal Assent is conferred, could breach the main body of the [Withdrawal Agreement](#) (WA) and/or the [Protocol on Ireland/Northern Ireland](#) ('NIP' or 'the Protocol'). Section 2 will then consider the general and special dispute resolution mechanisms available within the Withdrawal Agreement to pursue such claims. In summary, if the Bill were to come into force in its present form, the EU could claim an immediate breach of Article 4 WA before the Joint Committee. Any claim made before the Court of Justice of the European Union under [Article 12\(4\) NIP](#) that regulations exercised under the Bill breach the Protocol on Ireland/Northern Ireland could only be made if and when these powers were exercised.

## The compatibility of the UK Internal Market Bill with the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland

On 8 September 2020, the Secretary of State for Northern Ireland stated that the UK Internal Market Bill ['does break international law in a very specific and limited way'](#). This Commons statement has prompted the ongoing legal and political controversy over the Bill. The blanket statement that the UKIMB 'does break international law' obscures the legal detail of the situation. Finer-grained analysis reveals that, if and when it comes into force, the Bill would sanction: (1) two *potential permissions to breach* the Protocol on Ireland/Northern Ireland; and (2) two potential present breaches of the main body of the Withdrawal Agreement.

## **(i) The potential permissions to breach the NIP and WA**

[Clause 42\(1\) UKIMB](#) creates a permission for a Minister to make regulations about the application of exit procedures to goods. Clause 42(4) states that the regulations may make provision for disapplying, modifying, or stating/restating what an exit procedure is, or is not, applicable to. Article 5 NIP creates an obligation for the UK to charge customs duties on goods moving from Great Britain to Northern Ireland, or from anywhere outside the Union into Northern Ireland, if a good is at subsequent risk of being moved into the EU single market. Clause 42(1) UKIMB only bites upon goods moving from Northern Ireland into Great Britain. Ostensibly, therefore, powers exercised under clause 42(1), if and when in force, would not breach Article 5(1) NIP. Any breach of the Protocol would depend upon whether Article 5(3) NIP in tandem with Article 5(1) NIP create an obligation for the UK to apply exit procedure to goods moving NI-GB.

[Clause 43\(2\) UKIMB](#) states that the Secretary of State may create regulations that make provision about the interpretation and/or disapply or modify the effect of Article 10 NIP on state aid. This Article obliges the UK to apply EU state aid as listed in Annex 5. Therefore, if and when the Bill comes into force, if a Minister were to make regulations disapplying the domestic effect of Article 10 NIP, the UK would be in breach. If the regulations were to make provision about the interpretation of Article 10 NIP, the UK may be in breach of its obligations to ensure the domestic implementation and enforcement of the Withdrawal Agreement under Art 4 WA.

## **(ii) The potential actual breaches of the WA**

[Clause 45\(2\) UKIMB](#), if and when the Bill comes into force, would explicitly 'switch off' the domestic implementation of the Withdrawal Agreement in relation to clauses 42, 43, regulations made under these clauses, clause 45, and any other provision of UKIMB relating to the above. [Article 4\(1\) and \(2\) WA](#) oblige the UK to enact primary legislation to ensure that legal and natural persons can rely upon the provisions that would have direct effect under EU law, and the UK judiciary can disapply inconsistent or incompatible domestic provisions. The UK fulfilled this obligation through passing [section 5 of the European Union \(Withdrawal Agreement\) Act 2020, inserting section 7A into the European Union \(Withdrawal\) Act 2018](#). If Article 4 WA is construed as creating an ongoing obligation for the UK to continue to provide for domestic implementation and enforcement, it may be argued that clause 45(2)'s suspension of section 7A of the 2018 Act breaches this international treaty obligation. The only possible disagreement surround when exactly the breach occurs. The two options are that breach is made out on the date the clause comes into force with the rest of the Bill, or that breach would only occur on the date that incompatible regulations are issued under clauses 42 and/or 43, thus triggering the effect of clause 45 to switch off the implementation of the Withdrawal Agreement with regard thereto. This may be a salient issue if an amendment passes, such as the [amendment proposed by Bob Neill and others](#), which would establish either formal or substantive conditions before clauses 42, 43 and 45 come into force.

Finally, clauses 42, 43, and 45 may also be argued to breach [Article 5 WA](#) on 'good faith'. This first creates a positive obligation for the EU and the UK to take all appropriate measures to ensure 'fulfilment of the obligations' in the Agreement. Secondly, it creates a negative obligation for the EU and the UK to 'refrain from measures' which could jeopardise the attainment of the 'objectives' of the Agreement (as defined in [Article 1 WA](#)). If the proposal and/or coming into force of clause 45, with its effect of disapplying the direct effect of the Agreement in domestic law, breaches either the obligation to ensure the fulfilment of the obligations of the Agreement, and/or to refrain from measures that would jeopardise its objectives, the UK could be found in breach of Article 5 WA.

In summary, the argument that a breach may exist *at this present moment* is that the UK has breached its good faith obligations under Art 5 WA through the very act of proposing the Bill and the relevant clauses. A more nuanced analysis reveals that clause 45

of the Bill, if and when it comes into force, *will* arguably breach Article 4 WA, and clauses 42 and 43 may lead to a breach if a Minister issues regulations which breach Article 5 and Article 10 NIP respectively. The claim that such breaches would be 'specific and limited' may be somewhat sustainable. As Brandon Lewis noted later in his statement, the UK government would be 'taking the power to disapply the EU law concept of direct effect...in certain, very tightly defined circumstances'. These circumstances are tightly defined insofar as the switching off of section 7A of the 2020 Act would only be operable in relation to the clauses of the UKIMB and the powers exercised thereunder. Rather than tearing down the 'conduit pipe' whereby the WA flows into domestic law, the UKIMB would instead erect specified barriers in the pipe to shield certain areas of domestic law (on GB-NI exit declarations and state aid) from being touched by the full force of the UK's international obligations. However, erecting these barriers could threaten the cordial relations between the parties who stand at opposite sides thereof.

## **The dispute resolution procedures under the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland**

The crucial starting point is that the general dispute resolution procedures for breach of the main body of the Withdrawal Agreement are distinct from the special dispute resolution procedure under the Protocol on Ireland/Northern Ireland.

Therefore, drawing from the above section, if a claim is made that clause 45 of the UKIMA breaches Article 4 or 5 of the Withdrawal Agreement, this claim can only be made first in the Joint Committee. An arbitration panel may then only be established if the dispute isn't resolved in the Joint Committee within three months.

By contrast, if a claim is made that clauses 42 and 43, and/or powers exercised thereunder, breach Articles 5 or 10 of the Protocol on Ireland/Northern Ireland, then this may trigger the jurisdiction of the Court of Justice of the European Union.

A further important point should be made regarding chronology. [Steve Peers has argued](#) that the wording of [Article 185 of the Withdrawal Agreement](#) means that both the general and special dispute resolution procedure will only be available to the UK or to the EU after 31 December 2020. The article states that 'Parts Two and Three, with the exception of Article 19, Article 34(1), Article 44, and Article 96(1), as well as Title I of Part Six and Articles 169 to 181, shall apply as from the end of the transition period.'

If the qualifier 'as well as' is interpreted as referring to the first sub-clause of Parts Two and Three, and the prescription of application from the end of the transition period, then this means that the general dispute resolution procedures in Articles 169 to 181 will only apply from 1 January 2021. The alternative grammatical interpretation is that 'as well as' refers to the clauses which are included as 'exceptions', in which case the dispute resolution procedures would have been available from the coming into force of the Agreement on 31 January 2020. An authoritative determination of this arguable linguistic ambiguity could only be provided if the question were litigated before a national court and/or the Court of Justice of the European Union. A more holistic contextual interpretation, including factors such as the continuing jurisdiction of the Court of Justice during transition under Article 131 WA, may point towards the former interpretation of dispute resolution procedures only after transition.

The chronology regarding the special dispute resolution procedure under Article 12(4) NIP is more straightforward. The clause is not contained within the exceptions to the general rule that ['The Protocol on Ireland/Northern Ireland shall apply as from the end of the transition period'](#).

### **(i) The general dispute resolution procedure: Title III WA**

The general dispute resolution procedure under the EU-UK Withdrawal Agreement is found in ['Title III- Dispute Resolution' \(Articles 167-181 WA\)](#). As an important preliminary point, Article 167 WA creates an obligation for the EU and the UK to 'at all times

endeavour to agree on the interpretation and application of this Agreement', and further obliges the parties to 'make every attempt, through cooperation and consultations, to arrive at a mutually satisfactory resolution of any matter that might affect its operation' (emphasis added). This suggests that, if the EU claims that clause 45 UKIMB breaches Article 4 and/or Article 5 WA, both parties will be obliged to engage in good faith collaboration through the Joint Committee to find a solution before the commencement of joint arbitration procedures.

Furthermore, Article 169 WA clarifies that 'for any dispute...arising under the Agreement, the Union and the United Kingdom shall only have recourse to the procedures provided for in this Agreement'. This strongly implies that both parties are precluded from raising claims of breach of the main body of the Withdrawal Agreement in any other forum, including UK and EU Member State domestic courts, the Court of Justice of the European Union, and international courts including the International Court of Justice and the European Court of Human Rights (if the EU were to accede successfully to the ECHR).

If such a potential dispute does arise, Article 169 provides that a party wishing to commence consultations 'must provide written notice to the Joint Committee'. The parties must then enter into 'consultations in the Joint Committee in good faith, with the aim of reaching a mutually agreed solution'. A request to establish an arbitration panel may then only be made 'if no mutually agreed solution has been reached within 3 months'. For more detail on the rules of composition and functioning of the arbitration panel, see [Bingham Centre report on the EU-UK Future Relationship and the Rule of Law from March 2020 \(pages 8-12\)](#).

## **(ii) The special dispute resolution procedure: Article 12 NIP**

Article 12 of the Protocol on Ireland/Northern Ireland (NIP) establishes a special procedure for resolving UK-EU disputes that arise within the auspices of the Protocol. This special dispute resolution procedure does not rely on the Joint Committee or an arbitration panel. Instead, the procedure closely resembles the enforcement mechanisms available under EU law. (see [LSE Brexit Blog on the new Irish Protocol from October 2019](#) for more details).

[Article 12\(4\) NIP](#) states that the EU institutions shall have the powers conferred upon them by EU law in relation to Article 5, Articles 7 to 10, and Article 12(2)(2) NIP. This establishes that the European Commission, as an institution, has the power to bring infringement actions against the United Kingdom by reference to [Article 258 TFEU](#) if a claim is made that the UK has breached its commitments under these specifically defined Articles of the Protocol.

Article 12(4) continues by confirming that the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect. This jurisdiction is delineated in [Articles 251-281 TFEU](#). Crucially, this includes the jurisdiction to issue an authoritative judgment on whether a Member State has breached EU law. The simulacrum of Article 12(4) NIP replicates this function in relation to the United Kingdom.

This special dispute resolution clause concludes by outlining a further mechanism for judicial enforcement. The final sentence of Article 12(4) NIP confirms that the preliminary reference mechanism in [Article 267\(2\) and \(3\) TFEU](#) will apply to and in the United Kingdom regarding enforcement of Articles 5, 7 to 10, and 12(2) NIP. Article 267(2) TFEU creates a permission for any national court or tribunal to request a ruling from the Court of Justice when a question of validity and/or interpretation of EU law is brought by a natural or legal person. The national court/tribunal may make the reference if it considers a decision on the question '[necessary to enable it to give judgment](#)'. Article 267(3) TFEU creates an obligation for a national court of last resort to issue a reference in such a situation.

Prima facie, if and when the Internal Market Bill comes into force, and if a Minister creates regulations under clause 42 that breach Article 5 NIP, and/or the Secretary of State creates regulations under clause 43 that breach Article 10 NIP, then Article 12 NIP

provides for two mechanisms for judicial intervention:

- the **direct power** for the European Commission to bring a claim against the UK for infringement before the Court of Justice of the European Union;
- the **indirect power** for any natural or legal person within the UK to bring a claim before a national court, if they fulfil the relevant rules of standing; in such a situation the court would either have a permission or an obligation (if the Supreme Court) to issue a preliminary reference from the CJEU if this is necessary for judgment.

The manner in which clause 45 of the Bill seeks to disapply Article 4 WA and direct effect may, however, impact upon the second means of judicial enforcement.

### **(iii) Suspension of the special dispute resolution preliminary references under Article 12(4)?**

The Government's arguments in the [HMG Legal Position: UKIM Bill and Northern Ireland Protocol](#) raise a question over whether the possibility of preliminary references under the special dispute resolution procedure may be suspended if and when the UKIMA comes into force.

Paragraph 2 of the '[Legal Position](#)' argues that 'Clause 45 of the Bill partially disapplies the implementation in UK domestic law of Article 4 WA and the EU law concept of direct effect'.

Therefore, the government may regard this attempt to selectively 'switch-off' direct effect as sufficient to deprive the final sentence of Article 12(4) NIP of legal effect in relation to the subject matter of clauses 42 and 43. The objective of this provision is arguably to prevent domestic courts from hearing challenges to the legislation and issuing preliminary references under Article 267 TFEU. The preliminary reference procedure in Article 12(4) NIP may be regarded as a procedure that, under clause 45(2)(b), would cease to be recognised and available in domestic law if regulations under clause 42 and/or 43 were arguably incompatible or inconsistent therewith.

Although an interesting theoretical question, the issue of whether the Bill successfully 'switches off' the Article 12(4) NIP preliminary reference procedure may be moot due to the fact that the Commission has the aforementioned direct power to bring an infringement procedure against the United Kingdom as a matter of bilateral international treaty law. This means that a challenge at the domestic level would not be a necessary condition for dispute resolution procedures against the UK if a claim were made that powers exercised under clauses 42 and/or 43 were in breach of the Protocol on Ireland/Northern Ireland.

### **Conclusion: The possible breaches of international treaty law mandated by the United Kingdom Internal Market Act**

The text of the United Kingdom Internal Market Bill analysed above, and the [Ministerial statements](#) concerning domestic law taking effect 'notwithstanding...international...law with which [it] may be incompatible or inconsistent' have justifiably generated [concern in the legal community](#). This post has sought to cut through the noise of the debate to identify precisely whether and how the clauses of the Internal Market Bill may breach the international treaty law contained within the Withdrawal Agreement, including the Protocol on Ireland/Northern Ireland. Even if an [amendment is passed](#) that requires parliamentary approval before the clauses come into force, this would not alter the capacity of the clauses to breach international treaty law.

If clause 45 comes into force, it may be argued to constitute an immediate breach of the UK's obligation to give direct effect to the Withdrawal Agreement. In such a scenario, dispute resolution procedures could only commence in the Joint Committee, and a

joint arbitration panel could be established to resolve the dispute only if no resolution is found within 3 months after written notification. The earliest date on which such a breach could be argued to commence is the coming into force of the Internal Market Bill. If this occurs after 31 October 2020, and if the EU requests dispute resolution in the Joint Committee, Article 185 WA may mean that written notification can only be given to the Joint Committee after the end of the transition period, and therefore any subsequent attempt to establish an arbitration panel would not be possible before the end of the transition period on 31 December 2020. On this interpretation, the earlier date at which joint arbitral proceedings could commence would be 31 March 2021. Even if it could somehow be argued that the general dispute resolution procedures are in force already, if the Bill only comes into force after 31 October 2020 then an arbitration panel could not be established before the end of transition.

If clauses 42 and 43 come into force, this will not necessarily constitute an immediate breach of the Protocol on Ireland/Northern Ireland. Instead, the clauses would create the future possibility that a Minister or the Secretary of State could breach Articles 5 and 10 of the Protocol on Ireland/Northern Ireland. Only if and when such regulations were promulgated would the European Commission's power under Article 12 of the Protocol be activated, after the end of the transition period, providing the discretion to issue an infringement proceedings against the United Kingdom before the Court of Justice of the European Union.

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