

# BREXIT

## THE STATE OF PLAY



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17 September 2020

### Introduction

The latest round of EU-UK negotiations took place in London, between Tuesday, 8 September and Thursday, 10 September 2020, and while the two sides noted 'useful exchanges', there was limited progress noted on the most difficult issues for the talks. Ultimately, the negotiations themselves were heavily overshadowed by the introduction of the UK Government's Internal Market Bill on Wednesday, 9 September 2020.

The Bill seemingly contravenes provisions in the Protocol on Ireland / Northern Ireland relating to trade in goods and the agreed rules on State aid. Indeed, and quite remarkably, the Secretary of State for Northern Ireland, Brandon Lewis, admitted in the House of Commons on Tuesday, 8 September, that the Bill would breach the UK's international agreements "in a specific and limited way". The Bill itself states that its provisions in relation to Northern Ireland will: "have effect notwithstanding inconsistency or incompatibility with international or other domestic law."

Inevitably, this was a sobering backdrop to

negotiations which were already commencing on a pessimistic note, after little progress had been made in the accelerated schedule of talks which took place during the summer period.

This State of Play note will examine the contents of the Bill and detail the implications for relevant sections of the Protocol. It will examine its implications for UK internal cohesion, and for the UK's prospects of striking deals with third countries. Finally, it will examine what avenues the EU might pursue, should the UK renege on its obligations under the Protocol.

### The Internal Market Bill

Concerns about the Internal Market Bill had previously been raised by devolved administrations when the White Paper was published in July 2020. The Bill aims to ensure that the integrity of the UK internal market is maintained after EU competencies in a range of policy areas cease to apply to the UK. Devolved administrations argue that they should have the ability to set regulatory standards in areas that fall under devolved competencies, but this Bill would allow Westminster to retain control over an array of

policy areas in an effort to ensure a cohesive internal market.

The UK Internal Market Bill introduces principles of mutual recognition and non-discrimination to eliminate potential barriers to trade between the constituent parts of the UK. It guards against barriers to trade which might arise if devolved competencies legislated, for example, for different regulatory standards in goods which could be sold in their country.

The Bill would introduce mutual recognition provisions which would ensure that any goods sold in one part of the UK could also be sold on the same basis in another. The Bill also contains non-discrimination provisions which ensure that regulations made by an administration in one part of the UK does not discriminate against goods imported from another.

The Bill has been firmly rejected by the Scottish and Welsh administrations, who see the Bill as an attempt by Westminster to retain powers which, in their view, should rightfully be devolved. This has ramifications for the UK's internal cohesion; both the Scottish and Welsh Assemblies have said they will not support the Bill. According to the so-called 'Sewel Convention', Bills which relate to devolved powers should receive the consent of the devolved administrations. This is a political rather than a legal convention, as determined in a Supreme Court ruling in December 2017, meaning that devolved powers cannot look to the courts to uphold it. The Sewel Convention was subsequently breached twice: when the UK Government was legislating for the EU Withdrawal Act in 2018; and when passing the European Union Withdrawal Agreement Bill in January 2020.

These breaches, the first since the inception of the Sewel Convention, caused significant concern among devolved powers and raised

questions as to the internal cohesion of the UK at a pivotal time in its history. The SNP, for example, enjoys healthy support in Scotland. A recent YouGov poll found that it would receive 57% of the constituency vote in an election, which would win it 74 seats - a strong majority in the House. The poll also found a high approval rate for Nicola Sturgeon and low approval for Boris Johnson. More significantly still, when removing those who said they did not know how they voted, those who said they would vote "yes" to a vote on Scottish independence stand at 53% - the largest lead in the history of YouGov polling on the topic.<sup>1</sup>

The most controversial aspects of the Bill internationally, however, are the sections which contravene the Protocol on Ireland/Northern Ireland, which was written into international law and ratified in the Withdrawal Agreement Treaty in December 2019.

## The Protocol

The Protocol was designed to ensure there would be no hard border on the island of Ireland. In order to do this, despite being in the UK customs territory, the Protocol outlined that the UK would also apply the EU Customs Code in Northern Ireland, meaning relevant customs processes and checks on goods moving between Great Britain and Northern Ireland. The UK Trade Policy Observatory suggests that up to 75% of Northern Ireland imports could be subject to EU tariffs on arrival.<sup>2</sup> It also stated that Northern Ireland would continue to be bound by the rules of the Single Market in goods regulation, including areas such as: product requirements and safety; animal and plant health and welfare; food safety and standards for animal products; and farming standards. It also required Northern Ireland to align with EU State aid rules and rules on VAT on goods.

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1 <https://yougov.co.uk/topics/politics/articles-reports/2020/08/12/scottish-independence-yes-leads-53-47>

2 <https://blogs.sussex.ac.uk/uktpo/files/2019/12/full-final-draft.pdf>

From early on, Prime Minister Boris Johnson insisted that there would be no checks on trade in goods between Great Britain and Northern Ireland, raising questions as to how the UK planned to implement the Protocol. The EU, however, has repeatedly stated that the proper implementation of the Protocol is a prerequisite to reaching agreement on the future relationship. In May 2020, the Government admitted that there would be checks on certain types of goods, as well as additional processes for traders. This Bill, however, would seem to contradict this. This section will outline the ways in which the new Bill may override provisions in the Protocol.

### **Movement of Goods**

Article 5(2) of the Protocol states that all goods moving from Great Britain to Northern Ireland will be considered to be 'at risk' of moving into the Single Market unless certain criteria are fulfilled. These criteria, according to the Protocol, are to be established by the Joint Committee during the transition period. Significantly, if there is no agreement in the Joint Committee, all goods will be considered to be at risk and thus subject to tariffs.

The new Bill commits to law the UK Government's promise that Northern Ireland business will have unfettered access to the market in Great Britain. Given that the Bill specifically makes provision for the Secretary of State to make decisions which may otherwise be disallowed "under international and domestic law" in relation to the Protocol, it may mean that, should the Joint Committee not agree on criteria for 'at risk' goods before the end of the transition period, the Secretary of State for Northern Ireland may do so - in direct contravention of the Protocol

### **Exit Declarations**

The Bill contains specific provisions which would override the provisions in the Protocol for exit declarations on goods moving from

Northern Ireland to Great Britain. Under the Protocol, exports from Northern Ireland to Great Britain will need to be compliant with EU customs procedures, including completing exit summary declarations. Provisions in the Internal Market Bill state that the UK Government need not enforce or follow these provisions in the Protocol and that instead these decisions may be made by a Minister of the Crown.

### **State Aid**

In the Protocol, any State intervention or subsidies by the UK Government which could affect trade between Northern Ireland and the EU must be referred to the Commission for approval, to ensure that it is compliant with EU State aid rules. If the Commission believed the subsidy or intervention to be in breach of State aid rules and threaten the integrity of its Single Market, this would then be subject to challenge by the European Commission in the CJEU.

The Bill, if passed, creates specific legal entitlements for a Secretary of State to "interpret, disapply or modify" the provisions in the Protocol for the application of EU State aid rules in Northern Ireland. This may mean that the UK Government passes laws disallowing State aid rules in Northern Ireland to be interpreted in accordance with the case law of the CJEU or in accordance with any legislative act of the EU. It also says that no authority other than the Secretary of State will be able to notify the Commission of any relevant government subsidies, as required by the Protocol.

These provisions could entail a direct breach of international law, as the UK is unilaterally legislating to allow future Bills to be passed disregarding specific legal provisions it signed in an international treaty. This has caused consternation both within the EU, where frustration has been expressed with the UK's actions, particularly in light of the

ongoing negotiations, and also in the House of Congress in the USA, where Speaker Nancy Pelosi has warned the UK that Congress would not pass a free trade deal with the UK if the UK reneged on its commitments in the Protocol, jeopardising the Good Friday Agreement. It also raises questions as to how the UK would be perceived internationally as a trustworthy partner.

## Next Steps for the Internal Market Bill

The first reading of the Bill in the House of Commons took place on Wednesday, 9 September. Unsurprisingly, given the significant Government majority in the House of Commons, the Bill subsequently passed its Second Reading, which took place on Monday, 14 September by 77 votes. Two Conservative MPs voted against, and 30 abstained.

Attention now turns to the amendments which will be tabled and debated during the Committee stages on Tuesday 15, Wednesday 16, Monday 21 and Tuesday 22 September 2020. At this stage, MPs will be able to participate in debate, submit amendments and vote on the contents of the Bill.

A variety of amendments have been tabled which aim to limit the Government's ability in the Bill to undermine their commitments in the Protocol, but the amendment which has received the most attention, is one tabled by backbench Tory MP and Chair of the Justice Committee Bob Neill. This amendment does not make significant changes to the substance of the Bill, but would make it mandatory for Government Ministers to receive Parliamentary approval in the House of Commons before unilaterally acting to breach the provisions of the Protocol. This would limit the Government's actions to subvert the Protocol, by placing this power into the hands of MPs, rather than in a Minister of the Crown, but would not ultimately render the controversial aspects of the Bill void. It is thought that this amendment has the potential to garner sufficient support from Conservative backbenchers to pass.

After amendments are voted on and adopted, the Bill will then be sent to the House of Lords, likely by the end of September, which follows a similar procedure. The House of Lords may amend the Bill further, before it is sent back to the House of Commons for its approval. There can be a period of exchange between both Houses until a final text with all amendments is acceptable to both. At this stage, the Bill receives Royal Assent and becomes an Act of Parliament.

Under the Parliament Acts, the House of Lords can delay the Bill for up to a year, but are restricted under the same Act from fully vetoing the Bill if it has been passed by the House of Commons. If the House of Lords does reject the Bill, the House of Commons could ultimately reintroduce and pass the Bill in the following Session. If it is passed by the House of Commons but rejected by the House of Lords twice, it can ultimately pass and receive Royal Assent and become an Act of Parliament.

There is a parliamentary convention, which the Government may attempt to invoke, which says that the House of Lords should not vote down a Bill which the Government of the day committed to in its election manifesto. This convention, known as the Salisbury Convention, is not a legal obligation of the House of Lords, however. It may also be argued that this Bill is not specifically covered by the Salisbury Convention.

It is possible the House of Lords could delay the passage of the Bill until after the end of the transition period, which according to the Parliament Acts, they may delay for up to 1 year. This would mean that at the end of the transition period, there would be no UK domestic legislation mandating UK Ministers to break international law.

## Options for the EU

There appear to be two avenues open to the EU to take action against the UK in the event

of a breach of the UK's agreements.

Following the introduction of the Bill, the European Commission circulated legal advice to Member States on the action it might take. The advice indicated that by even proposing the Bill, the UK Government is in breach of the good faith element of the treaty, meaning the Commission could take a case against the UK to the CJEU after the Bill is passed, but also before the Bill is adopted. Although this is unlikely to happen before the end of the year, infringement procedures for actions which took place before the end of the transition period can be brought to the CJEU for up to four years afterwards.

If the Commission is successful in this case, the CJEU could rule that the UK must adhere to its international obligations in the penalty, and if it fails to comply, impose a penalty payment on the UK.

The second avenue open to the EU is the dispute settlement mechanism under the Withdrawal Agreement. If agreement is not reached, the dispute will go before an independent arbitration panel, which could also impose financial sanctions on the UK if it is found to be in breach of its obligations.

If the UK refuses to comply with all of the above, the EU would be entitled to suspend its own obligations arising from the Withdrawal Agreement.

However, the first step the EU took upon the introduction of the Bill was to call an emergency meeting of the Joint Committee. The Chairs of the Joint Committee, European Commission Vice President Maroš Šefčovič and the U.K.'s Cabinet Minister Michael Gove met on the afternoon of Thursday, 10 September to discuss the EU's concerns. At this meeting, Vice President Šefčovič outlined that the EU does not accept the UK's argument that the Bill is designed to protect the Good Friday Agreement and gave the EU view that it in

fact does the opposite. He called upon the UK to withdraw the offending measures from the Protocol immediately and issued a reminder that the Withdrawal Agreement contains mechanisms and legal remedies to address violations of its obligations, which he said the EU would "not be shy in using."

Ultimately, if passed into law in its current form, the Internal Market Bill means that the UK will not properly implement the Protocol. If this happens, it will have serious implications for the border on the island of Ireland, as the integrity of the Single Market will be threatened by the flow of goods across the border.

## Conclusion

The UK Government decision to legislate to allow it to potentially breach its international agreements was an extraordinary step. Even if the Bill is blocked in the House of Lords, or amended during its passage to mitigate some of the breaches it would currently facilitate, the admission by a Government Minister in the House of Commons that the UK is prepared to breach international law in a recently signed treaty, must send a strong message to potential international partners. The EU, already experiencing fatigue and frustration with the UK's red lines in the negotiations, will be unwilling to enter into another agreement with the UK if they have failed to act in good faith in respect of the one signed not ten months previously.

It has been suggested by some that in introducing the Bill, the UK is engaging in a form of brinkmanship in the negotiations. This would be supported by the argument that the UK is anxious about the provisions in the Protocol which effectively allowed, for example, for limited application of EU State aid rules within the UK. The UK is concerned that this would be open to liberal interpretation by the EU meaning that the EU would continue to exercise broad authority as regards State aid, possibly across the rest of the UK in the

event of no-deal. Consequently, it is possible that the UK considers this section of the Protocol will have undermined its position in the negotiations, given its refusal to come to an agreement on State aid and the level playing field.

However, the fact that the UK has chosen this path bodes ill for reaching agreement in a negotiation in which both time and goodwill are in short supply.

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The IIEA acknowledges the support of the Europe for Citizens Programme of the European Union



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