

Memorandum

Subject: The United Kingdom Internal Market Bill currently before Parliament, and its potential impact on the Crown Dependencies.

Date: 27th November, 2020

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Discussion of the proposed United Kingdom Internal Market Bill (the “IMB”) in the Crown Dependencies has centred on and orbited around the political issues of the consequences of the withdrawal of the United Kingdom from the EU and in particular the Northern Irish Issue, as to in which Customs Territory UK(NI) is to be situated.

Very little is being said about the main thrust of the United Kingdom Bill and its potential effects upon the Crown Dependencies who are in fact excluded from the application of the Bill in its present drafting and form. As is well known, the United Kingdom Parliament cannot legislate for the Crown Dependencies without consultation or consent, although any excuse to undermine that historical constitutional fact is regularly developed by English MPs.

That should be setting off alarm bells, as the IMB is intended to replace and expand upon the regulatory framework within which the UK found itself when within the EU. An internal market includes not just goods, whether agricultural commercial or other, but services, persons, income and capital payments, generally known as in EU terms as the Four Freedoms. The regulatory impact of those principles was of course far wider than those four economic items.

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“Getting your laws back” meant inventing and defining them after a half century of leaving them in the hands of someone else whilst holding one of them between the shoulder blade.

On Withdrawal, the United Kingdom administration set about constituting a framework for regulating its future Internal Market into four devolved sections, being the Four Nations of which the UK is made up: England, Scotland, Wales and Northern Ireland.

Until the IMB was introduced, the only visible sign of these principles and their negotiation was what was known as the Collaborative Framework between Whitehall and the Devolved nations designed to define, compare and effectively commence a form of soft self-regulation of the market components within the Four Nations, and to see how the comparative advantages and disadvantages of production of goods, services and other economic in each could be placed in such a market and regulated within the UK both on a devolved but as importantly on a centralised basis, the latter being required within the framework of any Free Trade Agreements to follow on. The most imminent and important being that with the EU.

It was naturally only toward the end of the Brexit transitional period that the IMB could be wheeled out as the statutory and Regulatory framework within which that collaborative approach could be regulated. If you wish not horizontally as was the case within the EU internal market, but on a Top down basis run from Westminster. Again, whilst on the surface this only affects the United Kingdom and its four constituent nations, anyone who believes that this will not affect Crown Dependency undertakings transacting into the UK or receiving goods and services from the UK is likely to have to adjust quickly to the new regulatory parameters which could be imposed through the future framework.

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Let us not forget that the main regulatory burden was carried out by the UK by reference to EU horizontal Regulations and Directives. The IMB provides a different statutory framework and has a more “top-down” approach.

The IMB applies to goods, services and movement and establishment of persons, a little like the Internal Market of the EU.

It will soon be appropriate and necessary to define into which of the Four Nations goods and services can be exported and perhaps even adapt those goods and services into each national jurisdiction. The landing point in the UK Internal Market will be important in certain areas, as if imported into one nation, goods will enjoy free movement throughout the other Nations markets, with the possible Northern Irish border questions with the EU and the UK needing specific attention.

It is inevitable that each nation might either protect its own, or conversely move to attract business in from the CDs on a comparative or even regulatory basis. Once you have managed to export goods into one of the Four Nations legally, that good can have free movement throughout the UK market. If you cannot get it through into one, then you cannot sell it within the UK.

Services and other provisions are also dealt with in the IMB, as are professional qualifications and their recognition.

The crunch would come were the current customs arrangements between the UK market and the CDs to be extended to issues other than Excise duty and VAT/GST.

Why is Northern Ireland or UK(NI) relevant to the CDs?

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It was inevitable that political posturing be involved in cloaking the UK's submission to the EU's conditions for access to its own internal market and the inclusion of Northern Ireland in it to enable the Good Friday Agreement to be maintained and respected. That meant that there were at least four areas of ambiguity¹ involved in the Withdrawal Agreement and the Northern Ireland Protocol. The UK Government is currently attempting to obviate these in the current negotiations on Partnership or Trade Agreement hoped to be effective on 1st January, 2021 or at 23:00 31st December, 2020 for the UK.

Despite their legal clarity, these political “ambiguities” follow a similar pattern, for example:

1. The WDA stated that Northern Ireland was part of the United Kingdom Customs territory. True, but the economic fact is that under the WDA, any exports from UK(NI) West-East to the UK have to fill out an EU customs declaration to leave Northern Ireland. That is effectively written into the WDA;
2. Jurisdiction of the CJEU: the CJEU has jurisdiction over all parts of the NI Protocol as it does over the WDA.
3. State Aid: If State Aid is accorded by the UK and used in Northern Ireland, that aid will be subject to EU Commission supervision, there are also some areas within which the EU Commission is seeking a similar jurisdiction over UK goods destined for the EU market;
4. The East West provisions do not spell out the actual extent of the burdens imposed on imports or UK into UK(NI), these are contained in the phraseology employed in the NI Protocol and the WDA itself.

¹ Professor Weatherall, the Jacques Delors Professor of European Law at the University of Oxford has less kindly described these as « the Four Deceptions ».

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The Northern Ireland Question is just the beginning of the internal issues that the Four Nations are to face internally, and also externally. That's why the Crown Dependencies need to take care. The Ministry of Justice is meant to act as a form of *garde-fou* halting other Ministries in adversely legislating and regulating in relation to the Crown Dependencies, but in the heady rush for the Internal Market that is not likely to be the most immediate consideration for most Ministries. It is easy to say that these cloaking issues do not affect the CDs, but the UK Civil Service will grow in national confidence and self-assertiveness despite the current requirement to pass everything concerning the CDs through the Ministry of Justice and therefore the Privy Council Committee. The IoM might obtain some form of advantage on services into Belfast which is geographically closer.

However, the consequences of greater UK involvement in its own internal regulation, let alone that of the Four devolved Parliamentary assemblies, after relying implicitly upon the horizontal regulation of the EU internal market are likely to spark issues between the Four Nations, and the three territories close to it: the Isle of Man, Guernsey and Jersey. Remember the issue on the Jersey fulfilment industry and the reaction of the UK Government to consistent online protest from a high street traders NGO over VAT exemption?

There have been calls in the Island to “regulate” electricians and plumbers coming in from the UK.

As an example, the UK might start introducing qualitative restrictions on the supply of services into the UK, and even consider removing access privileges from UK qualified professionals practicing into the UK from a Jersey establishment, for example: architects and accountants. These issues will need to be watched.

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For a fuller explanation of what the UK [Internal Market Bill](#) contains and what can be expected, for example, on the mutual recognition principle for goods at s.2 and the relevant requirements definition at s.3, contact Peter Harris on (01534 625879) or peter.harris@overseaschambers.com.

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