

# In the Name of Peace and Integrity?

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Last Tuesday, something rare took place in Westminster. The UK Government officially announced its intention to breach the Withdrawal Agreement that it had signed and ratified a few months ago. Brandon Lewis, the Secretary of State for Northern Ireland, admitted that the [Internal Market Bill](#) which the Government was to reveal the following day '[does break international law in a very specific and limited way.](#)'

On Wednesday, true to its word, Boris Johnson's administration presented a bill that has already been described as an '[eye-watering attempt](#) to override the [Protocol on Ireland/Northern Ireland](#). Clause 42 of the Bill allows the UK Government to disapply through secondary legislation export declarations and other exit procedures that the Protocol on Ireland/Northern Ireland requires for goods that will be moving from Northern Ireland to Great Britain after the end of the transition period. Clause 43 gives the power to UK Ministers to disapply or modify the effect of Article 10 of the Protocol. The aim of the latter is to '[ensure that a level playing field is retained by precluding a more generous UK state aid regime from advantaging UK firms relative to EU competitors.](#)' Finally, clause 45 provides that the regulations made under the aforementioned provisions 'have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent'.

The Prime Minister valiantly defended the draft by declaring that such breach is necessary in order '[to uphold the integrity of the UK, but also to protect the Northern Irish peace process and the Good Friday agreement.](#)' Is that really so? In this post, I question the stated intentions of the UK Government. This draft piece of legislation not only does not defend the 'integrity' of the UK, but also creates frictions within the fragile political equilibrium of Northern Ireland.

In order to keep the Irish territorial border between the Republic of Ireland and Northern Ireland frictionless, the relevant Protocol attached to the UK's Withdrawal Agreement provides for a rather ingenious solution. The Protocol recognises that *de jure* Northern Ireland remains within the UK customs union, but EU customs legislation will still apply to the region even after the end of the transition period on 31 January 2020. Similarly, a significant part of the EU *acquis* on the free movement of goods will also apply extraterritorially with regard to Northern Ireland, and so will the EU law provisions concerning VAT and excise. This means that Northern Ireland will have a much closer relationship with the EU than the rest of the UK, adding an extra dimension to the special status of this devolved entity within the UK constitutional order.

## A Threat to Peace and UK's integrity?

I have argued in a series of [posts](#) and [academic papers](#) that such a differentiated arrangement for Northern Ireland should not be considered as a challenge to UK's constitutional integrity. Neither should the regulatory and customs checks that will be taking place in the Irish Sea. Within the EU legal order there are a number of cases where [different parts of a member state might have different relationships with the EU](#). The sovereignty of a (Member) State over these areas has never been challenged just because EU law is applied differently there.

However, the Prime Minister seems to suggest that the Northern Ireland arrangement poses a threat to the '[integrity of the UK internal market](#)'. It is true that after the end of the transition period, trade between the two sides of the Irish Sea will not be frictionless any more. The extent of the friction in the intra-UK trade will depend on the future UK–EU relationship. The more distant it is, the less frictionless the trade will be between Northern Ireland and Great Britain.

The proposed legislation, however, does not effectively deal with the perceived threat. Neither the amendment on state aid nor on export declarations effectively bridge the economic and trade divide between the two shores of the Irish Sea that will occur on 1 January 2021. Goods coming from Great Britain to Northern Ireland will still have to comply with the relevant EU legislation and undergo the required customs and regulatory checks creating significant friction to the UK internal market especially in the case of no trade deal.

Rather than protecting the UK internal market, the main aim of those two amendments seems to relate to internal political strategies. During the election campaign, Boris Johnson told '[Northern Ireland businesses they can put customs declarations "in the bin"](#).' At the same time, a looser state aid regime is at the very centre of [the political vision of the current government](#).

## Two Real Threats to Peace and Constitutional Integrity

If there is a threat to the fragile peace process and the constitutional integrity of the UK, however, it might come from the proposed legislation itself and the political developments that might follow as [the EU Commission has already noted](#). Starting with the peace process, the biggest unionist party in Northern Ireland DUP has cautiously welcomed the Bill '[as a step forward for Northern Ireland](#)'. They also 'stressed the need for more measures that would ensure closer regulatory alignment between post-Brexit Northern Ireland' and its metropolitan State. If this is to happen, not only will the painstakingly achieved compromise of the Withdrawal Agreement be wrecked, but the entire fragile political system of Northern Ireland will be knocked off-balance. It is worth remembering that the executive of Northern Ireland was only re-established in January 2020, after three years of gridlock. DUP's support to the breach of the Withdrawal Agreement might be considered as a sufficient reason for

the other parties that participate in the government to withdraw their support and thus for the executive to collapse again.

Moreover, from a constitutional integrity point of view, it is interesting to point out that clause 45 aims at creating a new type of secondary legislation that is immune to judicial review. Traditionally, immunity from judicial review is only afforded to Acts of the Westminster Parliament. Secondary legislation and acts passed by the devolved institutions can be judicially reviewed. In this case, the Government makes clear that it is prepared to give power to its own Ministers to pass regulations even if they are incompatible with 'any relevant international or domestic law'. It will be interesting to see whether the UK judiciary will be prepared to uphold the view put forward by the Government according to which clause 45 abolishes judicial review with regard to those regulations.

Similar to the episode of the prorogation of the Parliament, the current debacle is a clear sign of the priorities of the current UK Government. The 'intoxicating cry of "taking back control"' leads them to ignore the real concerns that relate not only with the peace process in Northern Ireland but also with the application of the rule of law in the whole UK.

