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# Northern Ireland and the United Kingdom internal market: the exception that disproves the rules?

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## ABSTRACT

Post-Brexit Northern Ireland (NI) occupies a unique position in the internal market of the United Kingdom (UK) due, primarily, to the Protocol on Ireland/NI, or Windsor Framework. Agreed as part of the UK–European Union (EU) Withdrawal Agreement, the Protocol/Windsor Framework provides that EU single market rules concerning the free movement of goods, customs, value-added tax, state aid and energy markets continue to apply in NI, despite it having formally left the EU along with the rest of the UK. To allow for the domestic implementation of the novel arrangements for post-Brexit NI, set out in the Protocol/Windsor Framework, the UK Internal Market Act 2020 (UKIMA) includes a series of specific provisions that except goods entering and leaving NI from the 'market access principles' established by UKIMA in certain circumstances.

This commentary first introduces UKIMA and then presents a review of its provisions that are specifically dedicated to post-Brexit NI. Concluded in March 2024, the analysis then provides an assessment of the implications of measures agreed between the UK and EU and laid down in the Windsor Framework texts published in February 2023, it also briefly considers the implications of the subsequent Safeguarding the Union deal between the Democratic Unionist Party and UK Government, finalised in January 2024.

Based on the analysis of UKIMA set against the backdrop of the Protocol, then Windsor Framework, then Safeguarding the Union, the commentary argues that the position of NI post-Brexit is not only newly unique but also newly consequential for those both inside and outside its borders.

**Keywords:** United Kingdom internal market; Northern Ireland; Protocol on Ireland/Northern Ireland; European Union; Windsor Framework; regulatory alignment and divergence.

## INTRODUCTION

This commentary assesses the unique position Northern Ireland (NI) occupies in the internal market of the United Kingdom (UK) following withdrawal from the European Union (EU) – Brexit – and as a consequence of arrangements agreed during the lengthy and contested process.

The Protocol on Ireland/NI (the Protocol)[1] which forms part of the EU–UK Withdrawal Agreement[2] requires that certain aspects of EU law continue to apply in NI after Brexit. Under such an arrangement, goods from NI can be freely traded into and within the EU single market and no new physical infrastructure is therefore required on the winding 300km land border on the island of Ireland.[3] A corollary of these novel arrangements is, however, that new checks and controls now apply on goods moving from Great Britain (GB) into NI, and the latter is subject to different regulatory requirements than everywhere else in the UK.

Such a unique set of arrangements has both legal and political implications; this commentary focuses on the former. In keeping with the theme of this Special Issue, the first section of the commentary contextualises the analysis by providing a brief and broad overview of the United Kingdom Internal Market Act 2020 (UKIMA),[4] with a focus in particular on its implications for devolved governments and institutions. Moving on to NI-specific content, the second section of the commentary presents an overview of the Protocol. Against this backdrop, the third section returns to UKIMA and considers provisions therein that are specifically dedicated to NI and were enacted to enable the Protocol's domestic implementation. Bringing the discussion up to the present, the fourth and final section discusses changes introduced following the conclusion of the Windsor Framework, and subsequently the Safeguarding the Union deal, and considers the actual and/or potential impacts these may have in view of the unique market position of post-Brexit NI provided for and reflected in the aforementioned international and domestic law instruments.

Throughout it is argued that the position of NI, post-Brexit, within the UK internal market is not only newly unique but also newly consequential for the operation of both domestic and international market dynamics.

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1 Protocol on Ireland/Northern Ireland.

2 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (30 January 2020).

3 For related analysis, see Katy Hayward, *What Do We Know and What Should We Do About the Irish Border?* (Sage 2020).

4 United Kingdom Internal Market Act c 27 2020.

## INTRODUCING THE UNITED KINGDOM INTERNAL MARKET ACT

The contemporary arrangements for devolution were established when the UK was an EU member state.[5] Against the backdrop of EU membership, the potential for intra-UK regulatory divergence between central government and the nascent devolved governments of Scotland, Wales and NI was more limited than it otherwise would have been at the inauguration of the post-1998 era of UK devolution. The requirement for the whole of the UK to follow EU rules by dint of its membership provided, in effect, a legal and policy scaffolding that restricted the degree of divergence that was possible between its constituent parts. By 2016, substantial areas of devolved competence in Scotland, Wales and NI intersected (fully or partially) with areas of EU competence;[6] the legal obligation for the Westminster Parliament and the devolved parliaments to comply with EU laws in these areas had, therefore, had a uniformising effect on policy development across the UK during its period of EU membership.

The UK's decision to withdraw from the EU therefore raised the prospect of much greater internal policy divergence between its different administrations. Facing such a scenario, the UK Government opted to mitigate the risk of unmanaged intra-UK divergence by introducing legislation 'in connection with the internal market for goods and services in the United Kingdom'.[7] An overarching objective of the United Kingdom Internal Market Bill (later Act) was, in the language of the UK Government, to 'preserve the ability to trade unhindered in every part of the UK'[8] – its provisions are thereby purposed to serve a similar function to that of the EU law and policy frameworks which ceased to have effect across the UK when Brexit (to borrow a phrase) 'got done'[9] on 31 January 2020 and took full effect at the end of the transition period 11 months later.

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5 From 1920 to 1972 there was a devolved parliament and government in Northern Ireland. For an overview of pre-1998 devolution, see Lisa Claire Whitten, 'Constitutional change in Northern Ireland' (Institute for Government and Bennett Institute for Public Policy 2023).

6 According to the Common Frameworks initiative, in total 152 areas of devolved policy intersected with EU law or policy (in whole or in part): of these – reflecting the scope of each devolution settlement – 149 were in NI, 101 in Scotland, and 65 in Wales. See Cabinet Office, 'Frameworks analysis 2021' (9 November 2021).

7 UKIMA long title.

8 Department for Business and Trade, 'UK Internal Market' (21 September 2021).

9 Prime Minister Boris Johnson's campaign in the 2019 general election was orientated around a promise to 'Get Brexit done'. See Billy Perrigo 'Get Brexit done! The 3 words that helped Boris Johnson win Britain's 2019 election' (*Time Magazine* 13 December 2019).

UKIMA introduced two 'market access principles' to govern trade within and between the different parts of the UK. First is the principle of mutual recognition, according to which any goods or services that are regulated in one of the UK's constituent territories can be traded in any other part of the UK without having to satisfy regulations set in those local markets. Second is the principle of non-discrimination, according to which goods or services being moved into one of the UK's constituent territories from any other part of the UK cannot be treated differently from locally produced goods and/or local service providers.

Striking a balance between regulatory autonomy and free trade is a challenge with which all internal market regimes must contend. In this respect, UKIMA market access principles are not unusual in and of themselves; indeed, they are relatively liberal compared to other internal market regimes given that they do not require regulatory harmonisation but instead enable each UK constituent territory to set its own regulations and standards within the bounds of competence.[10] Notwithstanding its comparative liberality in theory, however, for several reasons the UKIMA's market access principles can be expected in practice to have a centripetal effect on regulation (and control of it) within the UK. While the Act preserves the autonomy of each UK legislature, it also effectively reduces their reach: if, for example, the Welsh Government were to adopt a law that obliges an increase in welfare standards for farmed animals, those new higher standards will apply to the meat farming industry in Wales, but they cannot apply to all meat sold in Wales because products from elsewhere in the UK, or imported into the UK, which do not conform to the (hypothetical) higher Welsh standard, must still be recognised and accepted for sale there. Moreover, any increase in regulatory or welfare standards is likely to increase costs of production. This means that, in the event of a local legislature raising standards, local producers are likely to be undercut by non-local goods entering the local market which have not had to absorb the cost of a higher regulatory burden.[11] For this reason, UKIMA is also likely to have an overall deregulatory impact on the UK market.

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10 See George Anderson (ed), *Internal Markets and Multi-Level Governance: The Experience of the European Union, Australia, Canada, Switzerland, and the United States* (Oxford University Press 2012).

11 This example is not entirely hypothetical, particularly in respect of welfare standards of imported meat products – recent trade deals negotiated by the UK Government with Australia (in 2021) and New Zealand (in 2022) raised concerns in the devolved institutions regarding the potential detrimental effect of imported meat on the local agricultural and farming industries. See Senedd Economy, Trade and Rural Affairs Committee, Letter to Vaughan Gething MS Minister for Economy – UK–Australia Free Trade Agreement – impact on Wales (Official Correspondence 2 May 2022).

Although the market access principles apply to the whole of the UK – albeit with some NI exceptions which are discussed in detail below – the asymmetric nature of the UK's territorial arrangements makes it very likely that rules set by the Westminster Government for the English market will have a pervasive effect across the state. While devolved governments may still choose to set distinctive and/or higher standards which reflect their own policy priorities or commitments – for example in the case of Scotland, remaining aligned with EU standards[12] – doing so now risks putting producers or service providers in the relevant jurisdiction at a competitive disadvantage, assuming the distinctive or higher standards come with associated higher costs. The incentive against opting for higher regulatory standards in any given UK territory due to the possibility of undercutting may also therefore serve to undermine the principles and/or values which would underpin any such standards. In this context, it is also worth noting that the market access principles – again setting aside the NI case for now – come with a very limited list of permissible exceptions which primarily relate to biosecurity matters (ie combating the spread of pests, diseases, or unsafe food products) and/or responses to a 'public health emergency' posing an 'extraordinary threat' to human health.[13]

Overall, therefore, UKIMA can be said to, in the main, prioritise unfettered internal trade – NI exceptions notwithstanding – and deregulation over the law-making autonomy of the constituent territories of the UK. As subsequent sections make clear, the overarching implications of the legislation are contextually important when it comes to understanding UKIMA's NI-specific exceptions.

## INTRODUCING THE PROTOCOL ON IRELAND/ NORTHERN IRELAND

Post-Brexit, NI occupies a novel position both within and between the UK and EU markets. Designed to address the 'unique circumstances on the island of Ireland', the Protocol, which forms part of the EU–UK Withdrawal Agreement, provides that aspects of EU law continue to

12 Lisa Claire Whitten, 'European Union law tracker: a report for the Scottish Parliament Constitution, Europe, External Affairs and Culture Committee' (Scottish Parliament Constitution, Europe, External Affairs and Culture Committee 14 September 2023).

13 This contrasts with the EU single market which does have inbuilt mechanisms and procedures which allow member states or regions therein to seek derogations and/or exceptions to its 'four freedoms' on the basis of justified circumstances. These can include local environmental concerns, health objectives, consumer protection needs or employment standards.

apply in NI despite it no longer being part of a member state, having left the bloc along with the rest of the UK on 31 January 2020.

Under the (unamended) terms of the Protocol, while NI remains part of the UK customs territory,[14] the EU customs code continues to apply there[15] as do specific EU Acts that regulate certain individual rights,[16] free movement of goods,[17] VAT and excise,[18] state aid[19] and electricity markets.[20] New EU Acts deemed to fall within the scope of the Protocol may also be added to those which already apply in NI, subject to agreement between the UK and EU.[21] Additionally, the Protocol requires that any amendments or replacements made at EU level to those Acts which it has made applicable in NI will automatically have effect.[22] NI, therefore, is in a relationship of dynamic regulatory alignment with aspects of the EU single market, primarily related to the movement of goods.[23] Among the purposes and consequences of such an arrangement is the avoidance of need for a physical hardening of the winding 300km land border on the island of Ireland. Free movement of goods on the island of Ireland can continue, notwithstanding Brexit, and, unlike their counterparts in GB, traders in NI can continue to enjoy free access to the EU single market in respect to goods. The corollary, however, is that new checks and controls are required on goods entering NI from GB, particularly in light of the broader arrangements for EU–UK trade after Brexit which, under the Trade and Cooperation Agreement, allow for divergence of regulatory requirements between the two signatories in respect of goods (excluding, in the UK case, NI).

For both the UK and the EU, the arrangements provided for in the Protocol are novel. Under its terms, the UK Government is responsible for ensuring that those EU rules and regulations that continue to apply to NI under the Protocol are properly implemented. From an EU perspective, this constitutes an outsourcing of the management of its single market for goods to the now third-country UK. From a UK perspective, the Protocol introduces barriers to trade within its internal market due to the obligation for EU rules to be followed in NI

14 Withdrawal Agreement 2020; Protocol, art 4.
15 Protocol, art 5.
16 Ibid art 2.
17 Ibid art 5.
18 Ibid art 8.
19 Ibid art 10.
20 Ibid art 9.
21 Ibid art 13(4).
22 Ibid art 13(3).
23 Lisa Claire Whitten, 'Post Brexit dynamism: the dynamic regulatory alignment of Northern Ireland under the Protocol on Ireland/Northern Ireland' (2022) 73 (S2) Northern Ireland Legal Quarterly 37.

but not in Great Britain. This latter effect – the creation of a so-called 'Irish Sea border' – has been the cause of considerable controversy. Leaving aside the (divisive and extensive) politics of the Protocol, its pertinence for our purposes is in how it relates to and is reflected in the UKIMA; to this, the next section turns.

## THE UNITED KINGDOM INTERNAL MARKET ACT AND NORTHERN IRELAND

The regulatory implications of the Protocol are evident in UKIMA. To allow for the domestic implementation of the novel arrangements for post-Brexit NI, set out in the Protocol, UKIMA includes a series of specific provisions that serve to except goods entering and leaving NI, in certain circumstances, from the 'market access principles' established by the Act. This section sets out the NI-specific provisions of UKIMA and briefly notes their significance – the subsequent section takes the analysis further, including by considering the potential implications of amendments agreed by the UK and EU in the Windsor Framework, and later between the UK Government and the Democratic Unionist Party (DUP) in Safeguarding the Union.

### UKIMA, section 11, and qualifying Northern Ireland goods

A first collection of NI-specific provisions in UKIMA relates primarily to the movement of goods from Great Britain to Northern Ireland (GB–NI). Section 11 of UKIMA introduces 'modifications' (read 'limitations') to the market access principles such that, in relation to goods, they apply to any part of the UK *other than* NI. Regarding rules on the sale of goods in NI, generally, the Act defers to the Protocol and the provisions of UK law for its domestic implementation.[24] What this means is that GB goods cannot be automatically acceptable for sale in NI and, therefore, the principles of mutual recognition and non-discrimination cannot be upheld. The acceptability or otherwise of goods placed on the market in NI is instead governed by the Protocol generally and its article 5 and annex 2 in particular, which make approximately 300 EU law instruments related to the regulation of goods applicable to the UK in respect of NI.

To complicate matters further, in addition to the overarching non-application of the market access principles to NI goods, under section 11(2) and 11(5) the mutual recognition and non-discrimination principles *do* apply to so-called 'qualifying Northern Ireland goods' (or QNIGs) – this amounts to a UK Government delivery of its promise to ensure 'unfettered access' for goods moving NI–GB. To determine

24 European Union (Withdrawal) Act 2018, c 18, ss 7A, 7C and 8C.

what the provision for QNIGs means in substance, section 11 of UKIMA must be read in tandem with the Protocol, aspects of the EU (Withdrawal) Act 2018 (EUW Act) and a statutory instrument passed under powers it bestowed.

The Protocol states that nothing in its provisions 'shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market';[25] and (paradoxically) to that end provides that any applicable EU laws that 'prohibit or restrict the exportation of goods shall only be applied to trade between Northern Ireland and other parts of the United Kingdom to the extent strictly required by any international obligations of the [European] Union'.[26] What this means in practice is that, according to the Protocol, the movement of goods NI–GB can be relatively unrestricted, essentially subject only to controls for a small number of dangerous or illicit products. Enacting this commitment domestically would require dedicated legislation.

Among the (considerable) regulation-making powers granted by the EUW Act, UK ministers were empowered to make regulations to 'facilitate the access to the market of Great Britain of qualifying Northern Ireland goods' (section 8C(3)) and also to define, by regulations, what exactly these QNIGs would be (section 8C(6)). Just before the end of the transition period, in December 2020, a definition of QNIGs was adopted in legislation. Under the relevant statutory instrument,[27] goods that have either undergone processing in NI[28] or which are present in NI and are not subject to, or have successfully completed, any customs supervisions, restriction, or control[29] meet the definitive threshold of 'qualification'. While this is a relatively broad definition, read in the context of the obligation under the Protocol for EU laws on customs to apply in NI, and to goods entering the territory, this domestic law definition of QNIGs is without prejudice to the full implementation of the Protocol. Returning to the provisions of section 11 of UKIMA, the application of the market access principles to

25 Withdrawal Agreement; Protocol, art 6(1).

26 Protocol, art 6(1).

27 The Definition of Qualifying Northern Ireland Goods (EU Exit) Regulations 2020, SI 2020/1454.

28 NI processed products are goods which: have undergone processing operations carried out in NI only and incorporate only goods which (i) were not at the time of processing under any form of customs supervision, restriction, or control or (ii) have been 'domestic goods' meaning they are wholly obtained in the UK or have been subject to a chargeable customs procedure; see Definition of QNIGs, Regulation SI 2020/1454, s 3 and Taxation (Cross-border Trade) Act 2018, c 22, s 33.

29 Except that which arises from the goods being taken out of the territory of NI or the EU (ie including into GB).

'qualifying NI goods' in substance only includes goods that move NI–GB and not GB–NI because, under the Protocol (as originally agreed), the latter are subject to customs controls and therefore do not 'qualify'. Additionally, any goods moving NI–GB and which, under article 6(1) of the Protocol, are subject to prohibitions or restrictions due to the international obligations of the EU, also do not meet the threshold for 'qualification'.

## UKIMA, part 5, and 'special regard'

Part 5 of UKIMA is specifically dedicated to NI.[30] Provisions here require that public bodies (of all kinds including ministers and/or departments across all UK administrations, central and devolved) have 'special regard' for the need to: 'maintain' NI's 'integral place' in the UK internal market; 'respect' NI's place as part of the UK customs territory; and 'facilitate free flow of goods' between GB and NI when either implementing the Protocol or taking 'any action related to the movement of goods' in the UK.[31] Part 5 goes on to set out a guarantee for 'unfettered access' for NI goods to the rest of the UK. A prohibition is introduced regarding new checks or controls on goods moving NI–GB unless required to: (i) facilitate access; (ii) comply with international obligations (including the Protocol); (iii) carry out voluntary customs procedures; (iv) or procedures required re VAT or excise under the Protocol; or (v) safeguard biosecurity or food safety of GB.[32] Thus, while these guarantees of 'unfettered' access are important, they are also conditional; nothing in this section conflicts with the direct effect of the Protocol in UK law or the 'modifications' (limitations) of UKIMA market access principles in relation to NI provided for elsewhere in the Act.

Further provisions are also made in the Act which relate to article 10 of the Protocol concerning state aid (in sections 48–49). These, in short, grant the Secretary of State for Northern Ireland significant powers in relation to operationalising UK commitments made in the Protocol to ensure compliance with relevant EU state aid laws in respect to NI–EU trade.[33] This is broadly in keeping with an effect of UKIMA on

30 This is where, as introduced, the UKIM Bill contained controversial 'specific and limited' law-breaking clauses; these were removed following UK–EU agreement in December 2020 when the two parties acting together in the Joint Committee took several decisions and made respective unilateral declarations regarding implementation of the Protocol. The 2020 Joint Committee decisions included an agreed definition of 'at risk' goods in the context of the Protocol (with implications for the scope of checks required on GB–NI movements) and established so-called 'grace periods' for some checks, most of which continued to apply until the Windsor Framework changes came into effect on 1 October 2023.

31 UKIMA, s 46.

32 Ibid s 47.

33 Withdrawal Agreement; Protocol, art 10, annex 5.

devolved powers more generally, whereby it (newly) made state aid an excepted or reserved area across the UK.[34]

To summarise, under UKIMA, trade in goods from NI to GB is guaranteed 'unfettered access' subject to international obligations (including the Protocol) and biosecurity monitoring (under the general provisions of the Act) – in practice this is unlikely to lead to much 'fettering' of NI–GB trade. When it comes to trade in goods moving from GB–NI, UKIMA market access principles are 'modified' to allow for the implementation of the Protocol – in practice this means that placing goods on the NI market is essentially governed by EU rules and not the UKIM principles, thus leading to 'Irish Sea border' checks and controls. UKIMA also, however, introduces a 'best endeavours' obligation on UK ministers and authorities to have 'special regard' for the place of NI in the UK market and customs territory when making any provision for the movement of goods. If taken seriously, this latter provision for 'regard' *could* be consequential for UK-wide regulation – the conclusion of the Windsor Framework, however, makes this scenario less probable.

## THE BRUSSELS (VIA BELFAST) EFFECT, THE WINDSOR FRAMEWORK, AND SAFEGUARDING THE UNION

Under the UKIMA framework, read together with the (pre-Windsor Framework) Protocol, NI could hypothetically serve as a legislative anchor or guideline for policymakers *if* the UKIMA obligation for 'special regard' for NI were to be taken seriously in Cardiff, Edinburgh and London.[35] In this scenario, choices regarding the regulation of goods across the UK could opt to mirror the 'UK(NI)' market and, by proxy, the EU market; notably, this would be in keeping with commitments already made by the Scottish Government for its devolved law to stay aligned with EU law.[36] Aspects of the Windsor Framework amendments to the Protocol, however, make it less likely that a 'Brussels via Belfast effect' will ever be realised.

On 27 February 2023, UK Prime Minister Rishi Sunak and European Commission President Ursula von der Leyen jointly announced the conclusion of the 'Windsor Framework' (WF) package of measures which proposed amendments to the legal text of the Protocol and a series of agreed easements to the arrangements for its implementation. In substance these were spread across an array of different legal and political documents which addressed a range of issues and (assuming

34 UKIMA, s 52.
35 Ibid s 46.
36 Whitten (n 12 above).

operationalisation) amount to a complex and contingent new arrangement for trade to and from NI. For our purposes, the most pertinent aspect of the WF relates to movement of goods from GB to NI and the establishment of a so-called 'green-lane, red-lane' system.

In its effort to address 'in a definitive way, unforeseen circumstances or deficiencies that have emerged since the start of the Protocol', the WF introduces a system for the movement of 'retail goods' from GB to NI that relies on differentiation according to destination.[37] Where 'retail goods' entering NI from GB are for use or consumption in NI they can enter via a 'green lane' process characterised by simplified certification procedures and non-application of some EU rules and regulations; where 'retail goods' entering NI from GB are or may be for use or consumption in Ireland or elsewhere in the EU they must enter via a 'red lane' process where all EU checks, controls, rules, and regulations will apply.[38] The WF definition of retail goods is narrow. It includes pre-packaged products of plant or animal origin, food and food contact goods, plants (other than for planting), ready to sell pet food and dog chews as well as composite food products. According to the UK Government, the WF results in '1700 pages of EU law' being 'disapplied' in NI;[39] however, much of this relates to the 'green lane' process where any so-called 'removal' of EU law relates only to GB–NI movements, only applies to certain goods being imported in specific circumstances, subject to trader authorisation and compliance with data-sharing, labelling requirements and market surveillance.[40] Importantly therefore, any EU law that is not applied to GB–NI goods entering through the green lane still applies to goods being produced for sale in NI. Read together with the UKIMA 'market access principles' this creates the risk (and arguably the probability) of NI producers being undercut in their own market.

Given timelines for implementation, assessing the significance of WF revision on the UK regulatory environment, NI's place within it, and the EU's relationship to it, is difficult. Much of the practical effects of the WF provisions, particularly as regards GB–NI movement of

37 European Commission and United Kingdom Government, 'Windsor Political Declaration by the European Commission and the United Kingdom Government' (27 February 2023).

38 Notably, now absent a series of 'grace periods' that have been in operation since the Protocol entered into force – initially on the basis of UK/EU agreement then under unilateral UK extensions.

39 UK Government, 'The Windsor Framework: A New Way Forward' (Cm 806 27 February 2023).

40 David Phinnemore and Lisa Claire Whitten, 'Analysis: How green is the green lane for goods under the Windsor Framework? There are situations in which it could fade or become blotchy' (*News Letter* 11 August 2023)

goods, will depend on the extent and nature of their use; this will only really become clear in time.

For our purposes, the important observation that can be made of the WF revisions is that they expose NI to the potential negative undercutting impact of the UKIMA 'market access principles' experienced in Scotland and Wales, but, under the revised system, NI will likely have to weather this market dynamic to a greater degree. The (Protocol-derived) obligation for NI producers to follow EU laws in respect to 'retail goods' (as defined by the WF) combined with the (UKIMA-derived) obligations to ensure non-discrimination and mutual recognition of GB imports of 'retail goods' to NI via the green lane which are not obliged to follow those same EU laws means that, while NI producers can be expected to experience some of the potential UKIMA undercutting effects that may also arise in Scotland and Wales, the authorities in Stormont will not have the same freedom that counterparts in Holyrood and Cardiff may have to act to address the matter (including in the case of the latter two, via the UKIMA exclusions procedure).[41] Because the requirements on NI producers derive from EU laws that apply under the Protocol – an international treaty negotiated and signed by the central UK Government – they are beyond the competence of devolved authorities. By contrast, in Wales and Scotland any undercutting effects that arise will be the result of decisions made by their respective institutions to adopt certain standards in the knowledge (and likely despite) any potential competitive disadvantages accrued as a result. While, therefore, there may be an (arguably understandable) frustration among Scottish and Welsh representatives at the possibility of UKIMA leading to undercutting, at least in any given instance there will be a measure of control and accountability for choices made; the same cannot be said for their counterparts in NI.

In January 2024 the UK Government published details of a deal that it had brokered with the DUP – Safeguarding the Union – with a view to providing sufficient assurance for the party to end its boycott of the Stormont institutions in protest against the implementation of the Protocol/Windsor Framework. Elements of the deal concerned the UKIMA, in particular, its guarantee for 'unfettered access' for NI goods to the rest of the UK market. Through a subsequently made statutory instrument – the Windsor Framework (UK Internal Market and Unfettered Access) Regulations 2024[42] – the UKIMA was amended such that its existing arrangements for (almost) unfettered movements of goods directly from NI to GB would also apply to goods moving indirectly from NI to GB via Ireland. Additionally, the new instrument

41 UKIMA, s 10.

42 SI 2024/163.

amended the definition of QNIGs such that the status of 'qualification' is more focused on goods produced by NI-based traders rather than just those being in free circulation in the NI market. It also granted the Secretary of State new powers to issue statutory guidance to assist relevant authorities in the exercise of their duty to have 'due regard' for the place of NI within the UK internal market in accordance with section 46 of the Act (discussed above). These new UKIMA provisions, taken together with other measures in the Safeguarding the Union deal, served as the basis for the DUP to re-enter the power-sharing institutions of NI devolution; they did not, however, fundamentally alter the (actual or potential) effects of the UKIMA in/on Northern Ireland, when read together with the Protocol/Windsor Framework.

## CONCLUSION

Implementation of the Windsor Framework revisions to the Protocol is due to be staggered, with key milestones stretching from late 2023 to early 2025.[43]

As noted in this commentary, the WF revisions to the Protocol (notwithstanding subsequent Safeguarding the Union assurances) have the potential to water down the significance, visibility and potential UK-wide repercussions of NI exceptions and NI specific provisions contained in UKIMA. Prior to the conclusion of the WF, the accommodations in UKIMA for the domestic implementation of the (unamended) Protocol served to, in effect, shield the NI market in goods from the otherwise deregulatory and centralising implications of the legislation (loudly decried in Cardiff and Edinburgh). At the same time an in-principle obligation, created by UKIMA, for all UK ministers to have 'special regard' for the NI position in general and its alignment with certain EU rules in particular created the possibility of a (continued) Brussels via Belfast effect if such an obligation was taken seriously. With the inauguration of the WF changes to the (as originally agreed) Protocol, however, the likelihood of this still-hypothetical Brussels/Belfast effect being realised is diminished. Aspects of the Safeguarding the Union deal arguably reflect an attempt to further mitigate any 'Brussels/Belfast' effect insomuch as they provide (at least in principle) commitments to ensure the NI market maintains parity with that of GB.

Notwithstanding the most recent changes, under current arrangements (applicable in spring 2024), the NI market is due to be newly exposed to the general (deregulatory and centralising) effects of UKIMA while also having uniquely constrained powers to mitigate

43 NI Assembly, 'Timeline and key documents' (2023).

against potential negative implications of the same due to binding obligations of the Protocol/WF in the first instance and potential future periods without a functioning devolved government in the second. If the (very real) potential opportunities of Northern Ireland's (newly) unique position as a place within and between the two markets of the EU and the UK are to be realised and maximised, effective devolution alongside full engagement with the novel structures for NI representation in EU–UK institutions that flow from the Protocol/Windsor Framework ought to be pursued, and swiftly.