

Comment

The Internal Market Bill: through the looking glass

Speed read

We live in extraordinary times. But the decision of the government to ask Parliament to give it express powers to breach an international law agreement that that same government entered into (and not only described as a triumph but secured its endorsement in a general election) is still a shocking turn of events.



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The Ireland/Northern Ireland Protocol is an integral part of the Withdrawal Agreement ('WA'): see article 182. As the recitals to the Protocol explain, its purpose is precisely to provide a 'unique solution' to address the 'unique circumstances of the island of Ireland' and to protect the peace process. It is designed to apply whatever the final relationship between the UK and EU may be, subject to the possibility of renegotiating aspects of it as part of that final relationship (article 13(8)). Article 4 of the WA requires the agreement, including the Protocol, to be given direct effect in UK law: that is to say, the Protocol is to have the same status (a source of rights and obligations that is supreme over any inconsistent UK legislation) as the EU Treaties had during the UK's EU membership. That obligation was implemented by s 7A of the Withdrawal Act, though Parliament also (in s 38) took the opportunity to restate the principle (which was true throughout EU membership) that Parliament is supreme: so that as a matter of domestic law it can, if it wishes and does so in clear terms, legislate contrary to the Protocol.

Clauses 42 to 45 of the Internal Market Bill clearly intend to contravene the Protocol in two ways. First, clause 42 allows ministers to make regulations as to the movement of goods from Northern Ireland to Great Britain that displace the position under the Protocol that the Union Customs Code applies to such movements (requiring export declarations). Second, clause 43 allows ministers wholly to redefine or modify the state aid provision in article 10: such regulations allow the government, like Humpty Dumpty, to define any part of article 10 as meaning just what the government chooses it to mean. Those powers include the right to remove rights to damages and other relief that would otherwise exist under that article.

Clause 45 – the ouster clause to end all ouster clauses – then provides that the government's power to regulate is not to be regarded as unlawful on the grounds of any incompatibility or inconsistency with relevant international or domestic law.

It may be noted that clause 42 does not deal with Great Britain to Northern Ireland movements – and so would not

deal with the supposed threat by the EU to make GB to NI food exports impossible by refusing to list the UK as a third country entitled to export such products to the EU (a threat that could be dealt with anyway by invoking the dispute resolution or safeguard procedures in the WA).

As to clause 43, despite the protestations that the purpose of the legislation is to protect Northern Ireland, the government's concern about article 10 is nothing to do with anything in Northern Ireland: it is that article 10 on its face applies to many UK measures (such as corporation tax measures) that have a knock-on effect on trade in goods between Northern Ireland and the EU ('effect on trade' being a low threshold in state aid law). There is no doubt that article 10 would lead to some uncertainty as to what was covered. But the solution to that uncertainty was always to fulfil the Conservatives' promise during the election campaign to produce a UK system of subsidy control and, on the basis of that, to get the EU to agree to remove or cut back article 10 as part of the final agreement. Indeed, in June the government told the House of Lords EU Committee that it was 'working at pace' on such a system so as to be 'in tandem' with the EU negotiations. But the pace seems to have been that of the Red Queen, and the government seems to have fallen off the tandem, because last week the government announced – without explanation – that no such regime would be ready until well into next year (a delay all the more extraordinary because the importance of the subsidies issue to the EU as part of the final relationship negotiations is obvious and well-known).

Consequences, consequences...

Assuming the clauses are passed, what are the legal consequences? Since article 5 of the WA requires the parties to refrain from 'measures' that jeopardise the objectives of the WA, it is likely that the government has put the UK in breach of the WA merely by placing the clauses before Parliament – a point worth remembering when you read some of the sophisticated arguments being advanced to explain why ministers have not breached the ministerial code. The EU will certainly invoke the various complex forms of dispute resolution mechanisms available to it under the WA. Any final agreement will require the clauses to be withdrawn: and if there is no final agreement, the EU may also respond by refusing to implement various facilitating measures that would allow UK businesses to continue to operate in the EU.

In domestic law, the huge issue will be the effect of the ouster clause. Right back to *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, the courts have objected to, and cut down, ouster clauses as inconsistent with the rule of law and the ability of the courts to scrutinise the lawfulness of acts of the executive. One point particularly worth noting is that the Bill is certified to be compatible with the European Convention on Human Rights (and the ECHR is not included as 'relevant international law' for the purposes of the ouster clause). That provides room for an argument that the ouster clause does not oust review under the Human Rights Act and that regulations that removed the right to damages under article 10 should be struck down as incompatible with article 1 of protocol 1 to the ECHR as removing the right to property in a way that (because it breaches the WA) is not in accordance with the law. In any event, it is almost certain that the matter would end up in the Supreme Court.

Whether or not the current government intended to set up another encounter with the courts, that is very likely to be what it gets, if these clauses are passed. ■