Parliamentary Briefing
Internal Market Bill
Committee Stage – House of Commons
21 September 2020

The Law Society is the independent professional body for 200,000 solicitors in England and Wales. We represent and support our members, promoting the highest professional standards and the rule of law.

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

1. Introduction

This joint briefing outlines the views of the Law Society of England and Wales and the Bar Council in relation to the Internal Market Bill ahead of the third sitting of the committee of the whole house.

The Bill, which passed its second reading on 14 September, makes provisions concerning the Northern Ireland Protocol and its stipulations on state aid and trade, and aims to guarantee unhindered trade between Northern Ireland, Scotland, England and Wales. It also creates secondary powers allowing Ministers to provide financial assistance through regulations.

The Law Society and Bar Council continue to have significant concerns on clauses 41 to 45 of the Bill. Although the subject matter is relatively narrow and technical in scope, focusing on trade with Northern Ireland, this is a highly charged political issue not only in the negotiations with the EU but also in the context of the Bill itself, which replicates various issues familiar from the EU internal market as principles to be developed in the narrower context of UK domestic law. It also has potentially serious ramifications for the relationship between Ireland and the United Kingdom, for individuals and businesses with connections to the island of Ireland.

Recommendations

Clauses 41-45 of the Bill should be removed from the Bill for the following reasons:

i. These provisions enable UK Ministers to derogate from the obligations of the United Kingdom under international law in broad and comprehensive terms and prohibit public bodies from compliance with such obligations. They represent a direct challenge to the rule of law, which include the country's obligations under public international law.

ii. There is a significant risk of violation of the United Kingdom's international law obligations, including the principle of good faith and sincere cooperation in the Withdrawal Agreement.

iii. There will be implications on the reputation of the UK around the world as a country with which to do business. This will be of global and long-term effect, particularly in the context of the ongoing negotiations with the EU and with other countries. The slightest threat could damage the rule of law and the perception of the UK as a credible and predictable trade partner, as well as the UK's position as a centre for international legal practice and dispute resolution, and the global use of English law.

iv. There will be negative consequences on the continuing cooperation with other jurisdictions in relation to civil judicial cooperation and enforcement of judgements. The Bill could be highly prejudicial to the UK Government's application to accede to the Lugano Convention.

v. The provisions could raise significant conflict between the courts and executive with regard to judicial review.

We therefore urge support for amendments 1, 2, 3, 50 and 51, which together would remove all of these clauses. We also support amendments 54 - 59, which would introduce stricter compliance.

The new amendment 66, adopted by the Government, is a limited positive step which would prevent these measures coming into force without specific endorsement by a motion in the House of Commons. However, the amendment does not alter the fact that these provisions expressly provide for derogation by the UK from its international obligations.

We are also concerned about the new amendments 64 and 65, which restrict the discretion of the courts in relation to the time limits for applications for judicial review of measures adopted pursuant to clauses 42 and 43.

2. Challenge to the rule of law

Clauses 41 to 45 of the Bill represent a direct and apparently deliberate challenge to the rule of law, which must be understood, including by the United Kingdom, to include its obligations under international law.

These provisions enable UK Ministers to derogate from the obligations of the United Kingdom under international law in broad and comprehensive terms and prohibit public bodies from compliance with such obligations (particularly clause 44(1)).

We are unaware of a precedent for such an approach in UK legislation or administrative practice, which cuts across numerous statements of high judicial and political authority confirming the country's consistent commitment to upholding the rule of law.

Furthermore, these measures affect the legal hierarchy of sources established in the Withdrawal Agreement (in violation of article 4 and 5). If the Bill is passed as introduced, the Northern Ireland Protocol and associated caselaw would have a subordinate role dependent on ministerial interpretation.

3. Potential breach of public international law

While the UK is no longer a Member State of the EU, the transitional period has not yet expired. We are therefore concerned that the effect of the proposed legislation will be to place the UK in breach not only of the specific provisions of the Northern Irish Protocol but also of the wider principles of good faith and sincere cooperation that continue to bind the UK under the general provisions of the Withdrawal Agreement during the transitional period.

It would be very undesirable for the UK to be placed in a position where the EU could accuse it, with considerable force, of a deliberate and fundamental breach of its general obligations during the transition period, with potentially far-reaching adverse effects both on the legal interests and international reputation of the United Kingdom.

Experts have suggested that the Bill could violate the principle of good faith and sincere cooperation in the Withdrawal Agreement. This could lead to dispute settlement proceedings being commenced against the UK and, and, therefore, a risk of retaliation from the EU including the suspension of trade as set out in the Withdrawal Agreement.

4. Implications on the reputation of the UK around the world

We are concerned at the implications of this initiative for the reputation of the UK around the world, including as a centre for international legal practice and dispute resolution, particularly in the context of the ongoing negotiations with the EU and with other current or prospective trading partners.

Given the stated ambition of the UK Government to be a leader in global trade, including in respect of professional services, which is one of the most important UK economic sectors, it sends a negative message to cast doubt on our willingness to abide by our international commitments or to retain a discretion to depart from such commitments at the discretion of UK Ministers.

The resulting damage to the UK's reputation would likely make prospective trading partners – including key UK Government targets such as the US and Australia, and important growth markets for the legal sector such as India and Brazil – far more wary of entering into trade agreements with the United Kingdom.

5. Implications on civil judicial cooperation

The UK Government has formally requested for the UK to accede to the Lugano Convention at the end of the transition period to enable civil judicial cooperation with our closest neighbouring jurisdictions to continue on an efficient basis. This is a sensitive political issue, where the UK is seeking to persuade other Member States and signatories, and the EU itself, to approve the UK's application. Again, we are very concerned that the present initiative will severely undermine those efforts and will cause significant prejudice to the reputation of the UK.

The UK no longer being party to the Lugano Convention is not in the interests of access to justice for UK and EU businesses and citizens, who will be affected by delay and disruption to the assertion of their legal rights.

6. Effect on judicial review

Clause 45 would exclude judicial review of any regulations made under clauses 42 and 43 on grounds of incompatibility with domestic law, including human rights measures, as well as international law. This has implications for the rule of law and the principles of access to justice, which are themselves a core component of the rule of law. The Government is now proposing a further procedural restriction on applications for judicial review of such measures.

It is unclear how the courts would interpret an "ouster clause" like this one: precedent suggests that only an ouster clause expressed in clearly unequivocal terms would hold up and would in any case not prevent a judicial review challenge based on an error of law.

This provision would also contravene the Withdrawal Agreement (direct effect provisions, Article 4 Withdrawal Agreement). This provision provides a right for individuals to directly rely on the Withdrawal Agreement provisions and challenge the UK or EU implementation in national courts, where they have clear, unambiguous rights under the Agreement. The individuals and businesses therefore have a right to ask for a judicial review under the Withdrawal Agreement and the UK cannot unilaterally deviate from this without breaching its obligations.

This Bill is therefore likely to cause significant conflict between the courts and executive with regard to judicial review.

Finally, even if the effect of the "ouster clause" was to prevent any domestic challenge to measures that were in breach of international commitments of the UK, there is a substantial risk that these issues will be litigated at the international level, with further adverse implications for the international reputation of the UK and its Government.

7. Absence of justification for the proposed measures

The Law Society and Bar Council do not believe there is a justification for the proposed measures. The Treasury Solicitor and Advocate General for Scotland have resigned as a result of this initiative and we are aware of direct criticisms expressed by Sir Bob Neill MP, the Chair of the Justice Committee and by a number of other very senior parliamentarians including the previous two Attorney Generals.

The adoption of a stricter Parliamentary procedure before such measures are brought into force does not address the substance of those criticisms. The mere fact that Parliament may endorse the bringing into force of a statutory instrument does not mean that the measure is no longer incompatible with international law.

The Law Society and the Bar Council have seen the statement from the Attorney General setting out the government's legal position on the Bill and the Northern Irish Protocol. We have also seen reports of advice given by the Attorney General to the effect that the commitment to the rule of law reflected in the ministerial code is limited to obligations under UK domestic law. If those views have been accurately reported then the Law Society and the Bar Council respectfully but fundamentally disagree with them.

In particular, the Law Officers note in their published statement itself recognises that, "*it is an established principle of international law that a state is obliged to discharge its treaty obligations in good faith. This is, and will remain, the key principle in informing the UK's approach to international relations."* The Law Society and the Bar Council agree with this statement, which reflects the consistent approach of the UK and its Courts to its obligations under international law.

However, the statement goes on to state the conventional "dualist" doctrine of UK domestic law, and to restate the principle of Parliamentary sovereignty, reaching the conclusion that, as a matter of UK domestic law, there is nothing unconstitutional or unlawful in Parliament adopting legislation that is inconsistent with its international obligations. This analysis is correct viewed exclusively as a matter of pure domestic UK law but it does not address the points that are of concern to the Law Society and the Bar Council, that the proposed approach is directly incompatible with the discharge of the legal obligations of the UK under international law.

The general position recognised by the UK Government of the discharge of treaty obligations in good faith, is clearly jeopardised by the proposed legislation. The UK remains bound by its specific obligations of sincere cooperation under the EU Treaties during the transitional period and equivalent obligations expressly set out in Article 4 of the Northern Irish Protocol. The Law Society and the Bar Council are of the view that the proposed adoption of legislation that is deliberately designed to confer powers on Ministers to act incompatibly with international law and to prohibit compliance with obligations imposed by an international treaty ratified by the UK and endorsed by Parliament, constitutes a clear breach of those aspects of the rule of law.

8. Devolution

We are also concerned that the potential effects of this Bill on the current devolution settlement are significant. As drafted, the Bill could affect the devolution settlement by providing the UK Government the ability to reduce the right of the Senedd, and other devolved Parliaments, to regulate within currently defined areas of devolved competence as each of them sees fit. We support the arguments made by the Law Society of Scotland in their Parliamentary briefing for Second Reading and Committee stage of the Bill.

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Annexe 1 – Amendments referred to in this briefing note

Clause 41

Labour amendment 52, 53

- 52 - The intention of this amendment is to confirm the process agreed in the Withdrawal Agreement as the mechanism for dispute resolution.
- 53 - The intention of this amendment is to omit the disapplication of international domestic law under Clause 45.

SDLP Amendment 50

- 50 – Leave out Clause 41.

Clause 42

Labour amendments 54, 55

- 54 – add 'the need to respect the rule of law." To the face of the Bill
- 55 - This amendment would remove the provision allowing international and domestic law to be disregarded when regulating exit procedures.

Liberal Democrat amendment 1

- 1 – leave out clause 42

Clause 43

Labour amendments 56, 57, 59

- **56 -** This amendment would require the Secretary of State to respect the rule of law and human rights while making provisions under this Clause.
- **57 -** This amendment would prevent the disapplication or modification of NI Protocol Article 10 under this Clause.
- **59 -** This amendment would stop regulations under this section about NI Protocol Article 10 having the effect that making rights, powers, liabilities, obligations, restrictions, remedies and procedures that would otherwise apply in relation to aid, would not be recognised because they are derived from international or domestic law.

Liberal Democrat amendment 2

- 2 – leave out Clause 43

Clause 44

Labour amendment 60

- 60 - This amendment would require the Secretary of State to respect the rule of law in complying with the duty to notify state aid in accordance with Article 10 of the Northern Ireland Protocol.

SDLP amendment 51

- 51 – Leave out Clause 44

Clause 45

Lib Dem amendment 3

- 3 - Leave out Clause 45

Government amendment 66

Clause 54, page 41, line 26, at end insert 3A

A statutory instrument containing regulations under subsection (3) may not appoint a day for the commencement of section 42, 43 or 45 unless— (a) a Minister of the Crown has moved a motion in the House of Commons to the effect that sections 42, 43 and 45 may be commenced on or after a day specified in the motion ("the specified day"), (b) the motion has been approved by a resolution of that House, (c) a motion to the effect that the House of Lords takes note of the specified day (or the day which is proposed to be the specified day) has been tabled in the House of Lords by a Minister of the Crown, and (d) the day appointed by the regulations is the same as or is after the specified day.

Government amendments 64 and 65 have the effect of excluding the discretion of the Administrative Court to extend time for applications for judicial review of regulations adopted pursuant to clauses 42(1) and 43(1) of the proposed legislation.