



Public Law Project

The United Kingdom Internal Market Bill **Briefing for the House of Commons**

Introduction

1. Public Law Project ('PLP') is an independent national legal charity. We work through a combination of research, policy work, training and legal casework to promote the rule of law, improve public decision-making and facilitate access to justice.
2. PLP takes no position on the UK's decision to leave the EU. Rather, our work on Brexit seeks to ensure that Parliament is appropriately sovereign, that the executive is held to account and that the interests of disadvantaged groups are protected.
3. PLP shares the serious concerns raised by many other commentators about the provisions of the United Kingdom Internal Market Bill ('the Bill') which seek to authorise Ministers to act in contravention of the UK's obligations under the Withdrawal Agreement, an international treaty which has been ratified by the UK and implemented into domestic law by the European Union (Withdrawal Agreement) Act 2020, as recently as January 2020. The significant implications of such a decision for the Rule of Law have been well ventilated. Parliament should be under no illusions as to the serious and far-reaching ramifications of enacting this legislation.
4. In this briefing we highlight two key areas of particular concern with the Bill, as they relate to PLP's areas of expertise:
 - (a) The introduction of delegated powers which purport to authorise Ministers to act in contravention of domestic and international law; and
 - (b) The attempt to immunise Ministerial use of delegated powers from legal challenge.

Clauses 42 and 43: Delegated powers to contravene the Withdrawal Agreement

5. By Clauses 42 and 43 of the Bill, the Government seeks to take a power to make Regulations which disapply, modify or otherwise contravene the UK's international law obligations under the Withdrawal Agreement and the Northern Ireland Protocol.
6. The very serious concerns about the implications for the Rule of Law of a decision to breach an international treaty to which the UK signed up less than a year ago have been raised by many other commentators. PLP shares those concerns, which extend far beyond the immediate subject matter of this Bill and call into question the Government's commitment to the Withdrawal Agreement, and potentially to other international treaties to which the UK is party.
7. PLP wishes to draw Members' attention to certain features of the mechanism which the Bill adopts to enable such a result. While the Government has sought to justify this step on the basis of the principle of Parliamentary sovereignty,¹ through Clauses 42 and 43 it in fact seeks to give *Ministers*, rather than Parliament, the power to make rules which are inconsistent with the UK's obligations under the Withdrawal Agreement, with only *post hoc* scrutiny of the exercise of those powers by Parliament.

¹ See statement of the Attorney General, "HMG Legal Position: UKIM Bill and Northern Ireland Protocol", published 10 September 2020: <https://www.gov.uk/government/publications/hmg-legal-position-ukim-bill-and-northern-ireland-protocol>.

8. PLP has previously raised concerns about the breadth of delegated powers, including Henry VIII powers to amend primary legislation, which have been given to Ministers in order to legislate for Brexit, in the EU (Withdrawal) Act 2018, the EU (Withdrawal Agreement) Act 2020 and in the Immigration and Social Security Coordination (EU Withdrawal) Bill currently before the House of Lords, among others.²
9. The powers which the Government seeks from Parliament through Clauses 42 and 43 represent a step-change. If enacted, they would give Ministers power through secondary legislation to legislate in a way which would otherwise be unlawful, whether as a result of domestic or international law provisions. There is very little in the clauses as drafted which circumscribes that power.
10. PLP's work scrutinising Brexit delegated legislation and the use of powers granted under the Coronavirus Act 2020 have illustrated the inadequacy of existing systems for scrutiny of secondary legislation.³ The procedure adopted by the Bill for scrutiny of these extraordinary delegated powers during the 'initial period' (the first six months) is made affirmative (cl42(6)(a); 43(4)(a)). This means that Ministers will be able to make Regulations which contravene relevant domestic and international law, which will come into effect immediately, and only subsequently be scrutinised by Parliament. After the first six months, any further use of the powers will be subject to draft affirmative and will have to be approved by a resolution of each House before they can be made.
11. The justification for the use of the made affirmative procedure in Clause 42 is said in the Delegated Powers Memorandum to be to give effect to the Government's commitment to ensure unfettered access by 1 January 2021 (§82) and 'the need to provide businesses and citizens certainty after the end of the Transition Period' (§83). In respect of Clause 43, the procedure is said to be justified on the basis that "The use of the made affirmative is suitable for a limited period of time when the regulations may need to be brought into force quickly, or amended quickly to take into account changes in EU law once the Protocol comes into force." (§97)
12. These justifications are inadequate to explain the use, for a 6-month period, of a procedure which allows Ministers to change domestic law in a way which is incompatible with international law or other provisions of domestic law, with no Parliamentary scrutiny before the provisions come into effect.

Clause 45: immunising Ministerial use of delegated powers from legal challenge

13. The concerns arising from these extraordinary delegated powers are further amplified by Clause 45 which seeks to immunise Clauses 42 and 43, and any regulations made under them, from legal challenge on the grounds of incompatibility with (broadly defined) relevant domestic and international law, including the Withdrawal Agreement.

² See, for example, "Preliminary Briefing on the European Union (Withdrawal Agreement) Bill", 23 October 2019: <https://publiclawproject.org.uk/resources/withdrawal-bill-agreement-public-law-project-briefing/>; Briefing on the Immigration and Social Security Coordination (EU Withdrawal) Bill, May 2020, <https://publiclawproject.org.uk/wp-content/uploads/2020/05/Public-Law-Project-Immigration-and-Social-Security-Bill-Briefing-for-second-reading.pdf>

³ See e.g. A. Sinclair and J. Tomlinson, 'Brexit Delegated Legislation: Problematic Results', U.K. Const. L. Blog (9th Jan. 2020) (available at <https://ukconstitutionallaw.org/>); Alexandra Sinclair, COVID-19 and delegated legislation, *Legal Action* April 2020 (<https://www.lag.org.uk/article/207899/covid-19-and-delegated-legislation>)

14. This provision is itself directly incompatible with the Withdrawal Agreement. Article 4 of the Withdrawal Agreement provides that individuals will be able to rely upon provisions of the Withdrawal Agreement and the Northern Ireland Protocol that meet the conditions for direct effect. Article 4(2) requires the UK to ensure that its judicial and administrative authorities have the power to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation. Accordingly, s7A EUWA 2018 was enacted to give domestic effect to that provision and ensures that these provisions are directly enforceable in UK courts. S7A(3) provides that all domestic legislation, including primary legislation, is to be read, and has effect, subject to the directly effective provisions of the Withdrawal Agreement.
15. Clause 45 of the Bill, however, provides that regulations made under Clauses 42 and 43 'have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent'.
16. "Relevant international or domestic law" is defined very broadly and includes "any... legislation, convention or rule of international or domestic law whatsoever" which itself includes "any order, judgment or decision of... any... court or tribunal".
17. Clause 45 therefore not only appears to seek to ensure that actions taken by ministers under Clauses 42 and 43 will prevail above other legislation, including primary legislation implementing international treaty obligations, but also that they cannot be questioned on the basis of any other rule of law. It is thus an attempt to immunise Ministers' use of the delegated powers in Clauses 42 and 43 from judicial review.
18. Such a clause gives rise to significant concerns. As currently drafted, the clause is general and vague in nature. It is likely to give rise to considerable uncertainty in terms of its scope and application, which is particularly concerning given that it involves potentially serious inroads into the constitutionally important safeguard of judicial review.
19. Any attempt to exclude executive powers from the possibility of judicial review should be approached with extreme caution. The government must act in a manner which is lawful and in accordance with Parliament's wishes. Judicial review is necessary to ensure that this is the case. Through Clause 45 the government is attempting to put into place a serious constitutional anomaly: a ministerial power exercisable without the possibility of any judicial oversight. Not only is such an action unprecedented, it is also profoundly concerning given the breadth and significance of powers given to ministers under Clause 42 and 43.
20. The apparent intention behind Clause 45 is to insulate the Government from scrutiny and render its use of extraordinary delegated powers unchecked. Not only does the Bill seek to exclude the scope for meaningful oversight by Parliament, but also the possibility of legal oversight by the courts. The point of judicial review "is to ensure that bodies which perform public functions should do so in accordance with the requirements of the law",⁴ which is essential for upholding the sovereignty of Parliament, the separation of powers and the rule of law. At least in its current form, Clause 45 represents a serious violation of these constitutional fundamentals.

If you would like to discuss points raised in this briefing, please do not hesitate to contact: Alison Pickup, Legal Director, a.pickup@publiclawproject.org.uk

⁴ Lord Woolf, "Droit Public – English Style" [1996] Public Law 61