Internal Market Bill
Consideration of Lords amendments – House of Commons
7 December 2020

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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 consideration of Lords amendments in the House of Commons.

The Bill, which was passed in an amended form by the Lords on 2 December, 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 had considerable concerns on what was Part 5 of the Bill, but this element was removed by the Lords. Although much of the rest of the Bill is relatively narrow and technical in scope, focusing on trade with Northern Ireland, Part 5 dealt with 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 had potentially serious ramifications for the relationship between Ireland and the United Kingdom, for individuals and businesses with connections to the island of Ireland.

We do not believe that anything resembling Part 5 should be restored to the Bill.

Recommendations

We previously recommended that the bulk of Part 5 should be removed from the Bill for the following reasons:

i. These provisions enable 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 recommend that nothing resembling what was Part 5 of the Bill, or its provisions, is restored.

2. Challenge to the rule of law

When the Bill was introduced to the Lords, Clauses 43 to 47 (five of the six clauses that made up Part 5) represented a direct and apparently deliberate challenge to the rule of law, which must be understood, including by the United Kingdom, to include obligations under international law.

These provisions would have enabled 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, such measures would affect the legal hierarchy of sources established in the Withdrawal Agreement (in violation of article 4 and 5). If the Bill is passed with such clauses included, the Northern Ireland Protocol and associated caselaw would have a subordinate role dependent on ministerial interpretation.

The version of the Bill passed by the Commons would also have created a legal anomaly. It would have enabled regulations made under clauses 44 and 45 to be treated as primary legislation. This would mean that such regulations would be excluded from being judicially reviewed (and potentially struck down if they were found to breach human rights legislation). Instead, the court would only have had powers to issue a declaration of incompatibility under section 4 of the Human Rights Act.

3. Potential breach of public international law

While the UK is no longer a Member State of the EU, the transition period has not yet expired. We are therefore concerned that the effect of the restoring Part 5 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.

The UK has now been placed in a position where the EU has accused 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 UK. Indeed, the European Commission sent the UK a letter of formal notice on 1 October 2020 under Art. 258 TFEU, claiming the UK is breaching its obligations to act in good faith under Article 5 Withdrawal Agreement.

UK experts have suggested that this claim could be well-founded and violate the principle of good faith and sincere cooperation in the Withdrawal Agreement. This could, in addition to the Infringement proceedings, lead to dispute settlement proceedings being commenced against the UK, and, therefore, a risk of retaliation from the EU including the suspension of trade as set out in the Withdrawal Agreement. 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. The reality of these risks have been made clear by a series of statements from US political leaders over the past few weeks.

4. 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.

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.

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.

5. Effect on judicial review

Clause 47 of the Bill as was introduced to the Lords would have excluded judicial review of any regulations made under then-clauses 44 and 45 on grounds of incompatibility with domestic law, including human rights measures, as well as international law. This would have implications for the rule of law and the principles of access to justice, which are themselves a core component of the rule of law. In addition, then-Clause 47 reclassifying regulations made under then-Clauses 44 and 45 for the purposes of the Human Rights Act 1998 appeared to be yet another attempt to curtail the jurisdiction of the courts in respect of such secondary legislation, contrary to the principle of access to justice as well as the principles underlying the 1998 Act itself.

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 if elements of Part 5 are restored.

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.

6. 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 of the Bill in the Lords.

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