

The government's legal statement

Some constituents have asked about the legal base for the legislation Parliament will consider next week. This is it:

HMG LEGAL POSITION: UKIM BILL AND NORTHERN IRELAND PROTOCOL

This is the Government's legal position on the UK Internal Market Bill ("the Bill") which was introduced on 9 September. The purpose of the Bill is to promote the continued functioning of the internal market in the UK after the conclusion of the transition period provided for in the Withdrawal Agreement and the European Union (Withdrawal) Act 2018. The Bill also provides for how aspects of the Northern Ireland Protocol to the Withdrawal Agreement apply in the UK's domestic law. In particular it ensures that the government will be able to deliver its commitments to protect peace in Northern Ireland and the Belfast/Good Friday Agreement, and to strengthen and maintain the UK internal market.

Clauses 42 and 43 of the Bill give HMG the power to make regulations to (i) disapply or modify the application of any exit procedures that would otherwise be applicable to goods moving from Northern Ireland to Great Britain, and (ii) make regulations setting out how the provisions of the Northern Ireland Protocol on State aid are to be given effect for the purposes of domestic law. The clauses provide that these powers may be exercised in a way that is incompatible with provisions of the Withdrawal Agreement. Clause 45 of the Bill expressly provides that these clauses, and any regulations made under them, have effect notwithstanding any international or domestic law with which they may be incompatible or inconsistent. This 'notwithstanding provision' partially disapplies Article 4 of the Withdrawal Agreement because it removes the possibility of challenge before domestic courts to enforce the rights and remedies provided for in the Withdrawal Agreement. The effect is to disapply the EU law concept of 'direct effect'. This is the case regardless of whether any regulations made under clause 42 or 43 of the Bill are in fact incompatible with the Withdrawal Agreement.

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. However, in the difficult and highly exceptional circumstances in which we find ourselves, it is important to remember the fundamental principle of Parliamentary sovereignty.

Parliament is sovereign as a matter of domestic law and can pass legislation which is in breach of the UK's Treaty obligations. Parliament would not be acting unconstitutionally in enacting such legislation. This 'dualist' approach is shared by other, similar legal systems such as Canada, Australia and New Zealand. Under this approach, treaty obligations only become binding to the extent that they are enshrined in domestic legislation. Whether to enact or repeal legislation, and the content of that legislation, is for Parliament and Parliament alone. This principle was recently approved

unanimously by the Supreme Court in R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5.

The legislation which implements the Withdrawal Agreement including the Northern Ireland Protocol is expressly subject to the principle of parliamentary sovereignty. Parliament's ability to pass provisions that would take precedence over the Withdrawal Agreement was expressly confirmed in section 38 of the European Union (Withdrawal Agreement) Act 2020, with specific reference to the EU law concept of 'direct effect'.

Sovereignty

We voted for Brexit to take back control. Brexit voters wish to live in a free self governing independent country. Remain politicians thought the vote should be about trade. They wrongly asserted we would definitely be better off in and thought that was all that mattered.

I have always thought sovereignty mattered more. I also think that we can follow policies that increase our prosperity once we restore our full powers of self government. I have set out at some length how we can be better off out. I can no more guarantee that than Remain politicians can guarantee greater income if we stay in. It will depend on how we use our freedoms and how the EU use theirs.

The Remain politicians have used a variety of ploys and devices to try to delay, dilute or prevent our exit. One of their first was the court case to prevent Ministers sending in our notice to quit without further Parliamentary processes, despite the clear referendum vote. The Miller case produced a useful defence of Parliamentary sovereignty in the verdict. I had always urged Mrs May to hold a Parliamentary vote on a one clause Bill to speed us up and was not surprised by the Court decision, even though it was clearly a delaying tactic.

The Judges said

"This is because Parliamentary sovereignty is a fundamental principle of the UK constitution, as was conclusively established in the statutes referred to in para 41 above. It was famously summarised by Professor Dicey as meaning that Parliament has "the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament" – op cit, p 38. The legislative power of the Crown is today exercisable only through Parliament. This power is initiated by the laying of a Bill containing a proposed law before Parliament, and the Bill can only become a statute if it is passed (often with amendments) by Parliament (which normally but not always means both Houses of Parliament) and is then formally assented to by HM The Queen. Thus, Parliament, or more precisely the Crown in Parliament, lays down the

law through statutes – or primary legislation as it is also known – and not in any other way “

This is now very helpful to the cause of Parliament legislating to sort out our border, customs and trade issues for the UK, notwithstanding the EU’s view of the Withdrawal Agreement. The Withdrawal Agreement is only the law because of the Act of Parliament that brings it into UK law. The UK Parliament is therefore free to amend it as it sees fit.

There are those who still seem to think it would be bad faith for the UK to exercise its sovereign powers in this way, and claim it is a breach of international law to do so. This Agreement between the UK and the EU is not some world law enforced by some world court. It is an international Agreement where the two sides disagree about its meaning and each claim bad faith about the other. Such disputes have to be sorted out between the two parties. This dispute could still be sorted by negotiation. Otherwise it will be sorted by the UK exercising its sovereignty over our single market and customs union, and the EU exercising its powers over its own. Doubtless neither side will like the other’s settlement. Each has to respect the powers of the other, as clearly stated in the Withdrawal Agreement itself.

[My speech during the debate on the Awarding of Qualifications: Role of Ministers, 9 September 2020](#)

Sir John Redwood (Wokingham) (Con): Having listened to the exchanges and read some of the documents before the debate, I am satisfied that the Secretary of State asked Ofqual to deliver the right answers. It is disappointing that its algorithm did not work and it was right that it had to be changed. Once the decision had been taken to close schools and not to proceed with exams, I think the best answer probably was to look to the teachers to evaluate the pupils and put them in the right rank order, but for there to be some moderating influence so that, overall, we got a fair spread of results. However, it appears that the algorithm did not do that and produced all sorts of individual injustices. It may have produced what Ofqual thought was the right answer school by school, but it did not produce the right answer pupil by pupil. That was a great pity and it was clear from what the Secretary of State has been saying that that was not shared with him, which is why we are debating this today. We should now move on. As many have said on both sides of the House, we need to learn lessons and make sure that the class of 2021 is better served and does not have the same difficult foray into getting their results as the class of 2020 did.

I am very pleased that a decision has been made that exams will be

reinstated. I note that we have had one Ofqual consultation already, with some conclusions, and a further consultation is under way. We have a series of new injustices that have to be dealt with, and they need to be dealt with quite soon, at this early stage. Some pupils were taught a full timetable of lessons remotely by their schools. Others had very little teaching during the summer period. Some schools were better equipped to press on with the full rigours of the GCSE and A-level courses and others were not. We need to ask ourselves what will happen in those situations, where some have been prepping for the full exam and others are now saying that perhaps they cannot in time prep for the full exam. Can we create some more time to make sure that all can be brought up to a satisfactory situation?

I see that it has been decided already that there will not be field work for geography and geology, which is quite a big loss, that there will not be formal oral examinations for languages, including English language, and that there will be less of a syllabus for those who are doing history and geography, in terms of choice of questions. These quite big decisions have already been made. I hope that there will be no need for any further decisions that could in any way undermine the reputation or the quality of the exam that will be set, and many will pass, for the class of 2021.

Rob Roberts (Delyn) (Con): Does my right hon. Friend agree that getting the students who are due to sit their exams next year, in all the subjects that he mentions, back into the classroom again is vital to their continued academic success? Will he also join me in welcoming Labour's refreshing new position of wanting to see all children go back, having dragged its heels on this issue over the summer?

John Redwood: I am delighted that the Opposition rightly wish to see children properly educated. I have never doubted that they wanted to see children properly educated—that must be a shared view that we all hold—but it would certainly be good if the Opposition carried on in the spirit of co-operation and responded to some of the consultations, for example, because very important decisions will now be taken over when the exams will take place, what the content of exams will be and how they will be marked and assessed. We need to have two things first and foremost in our minds: of course, we need to be fair to the pupils and to take into account that their education has been interrupted in recent months, but we also need to make sure that the system itself guarantees quality, so that they get a qualification that means something and is widely respected both at home and abroad. I hope that the Secretary of State will soon be able to bring forward positive proposals so that the class of 2021 can be properly looked after.

[The UK's international reputation as a](#)

trade partner needs this UK Single market Bill.

As so often the EU establishment puts round the wrong message. They say the UK's reputation will be damaged by legislating to make sure we control our own single market and customs union. The opposite is the case.

The rest of the world would think it bizarre if the U.K. meekly accepted continuing EU controls over our laws, trade rules and borders from 1 January. Those countries negotiating trade deals with us want to ensure the U.K. is fully in charge of its own markets and laws, so they can sign an Agreement with an independent country with the full range of trade powers. They do not want a U.K. under the control of the EU, or with a split domestic market with issues into and out of Northern Ireland.

Those who worry about international law or Treaty obligations should explain why the EU does not always accept WTO judgements and rulings when as a signatory to that Treaty it should. Why doesn't the EU allow member states and member states companies have direct redress at the WTO for EU non compliance?

In the case of the UK why do we not hear more about our non compliance with International human rights over prisoner votes? Why do the worried establishment accept Labour's limited implementation of the Human Rights Treaty, reserving to Parliament the right to override when needed?

The government rightly reminds us U.K. law will take precedence when we legislate. They are not yet explaining that the EU is not observing the parts of the Agreement they do not like, presumably because the U.K. hopes they will improve and show a new spirit looking for an Agreement. I fear the EU has dug in and expects the U.K. to crumble. That will reinforce our case that they have not negotiated in good faith and have not observed the WA's insistence that the U.K. will be sovereign with its own single market, customs union and independent trade policy.

Why I support the UK Single market Bill

I have stated why I think this Bill is necessary and legal. Let me remind those who write to me to complain about the draft legislation.

The EU Withdrawal Agreement left open a solution to the borders and customs issues in Northern Ireland. The Irish Protocol is at best ambiguous. There is

no single interpretation or right understanding of it, as it sought to bridge differences and leave a further period of negotiation to settle the future relationship in a way which would deal with the outstanding issues. Many of the problems would fall away were the EU to accept the UK Free Trade proposal which is included in the Political declaration signed by both parties.

Thus the Protocol is introduced by a series of propositions which include

“Nothing in this Protocol prevents the UK from having unfettered market access for goods moving from Northern Ireland to the rest of the UK’s internal market.”

“Underlining the Union’s and UK’s shared aim of avoiding controls at the ports and airports of Northern Ireland to the extent possible in accordance with applicable legislation and taking into account the respective regulatory regimes”

“Recalling that Northern Ireland is part of the customs territory of the UK and will benefit from participation in the UK’s independent trade policy”

“Having regard to the importance of maintaining the integral place of Northern Ireland in the UK’s internal market”

So the Agreement accepted the UK could diverge in regulations, and there would be no barriers to trade between Northern Ireland and the rest of the UK, which is what this Bill seeks to implement. The Agreement also put in various Union requirements which they now wish to highlight at the expense of these UK protections.

In case there is doubt, as there are some conflicts with other aims and clauses in the Agreement, Section 38 of the UK’s EU Withdrawal Act provides for a UK Parliamentary override of the provisions if necessary.

Mrs May and her advisers would not accept such a UK provision, as they thought it meant we would not properly implement the Agreement. The EU sustained no objection when this crucial safeguard was inserted and passed. They must have known it meant conditional or qualified implementation. Nothing is agreed until everything is agreed was a sensible mantra. I would not have voted for withdrawal without the crucial sovereignty override as I made clear at the time. I also made clear I expected we would need to use it if the EU did not proceed to an FTA respecting our sovereignty.

I also now have confirmed that the UK government also thinks it is acting legally. Speaking in the House of Lords, Lord Keen a Law Officer in the government said: ‘I continue in post and continue to advise, encourage and stipulate adherence to the rule of law – understanding that, from time to time, very real tensions can emerge between our position in domestic law and our position in international law.

‘It is not unprecedented for legislation passed by this parliament to cut across obligations taken at the level of international law. In those circumstances, domestic legislation prevails”

Both the Lord Chancellor and the Attorney General stay in post and have been party to the discussions on the draft legislation. The statement by the Northern Ireland Secretary is not a view shared by many, and is not as significant as the clear understanding of the Law Officers that the government is behaving legally.