

HOUSE OF LORDS

Select Committee on the Constitution

17th Report of Session 2019–21

United Kingdom Internal Market Bill

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CONTENTS

	<i>Page</i>
Summary	3
Chapter 1: Introduction	5
The Bill	5
Consultation and pre-legislative scrutiny	6
Chapter 2: The UK internal market and devolution	8
Implications of the Bill for devolution	8
Constraints on devolved competence	8
Limited consultation	10
Independent oversight, governance and dispute resolution	11
UK Government spending	11
State aid	13
Legislative consent	13
A way forward	14
Common frameworks	14
Strengthening intergovernmental relations	17
Chapter 3: UK market access and oversight	19
Introduction	19
UK market access: goods	19
Mutual recognition	19
Non-discrimination principle	20
Indirect discrimination	21
Exclusions	22
Supplementary provisions	23
UK market access: services	23
Requirements and exclusions	23
Discrimination in the regulation of services	24
Oversight and monitoring of the internal market	25
Northern Ireland Protocol delegated powers	26
The Belfast/Good Friday Agreement	27
Chapter 4: International law	29
Introduction	29
International legal context	29
Box 1: The Withdrawal Agreement and the Northern Ireland Protocol	30
International law violations	31
Disapplication of parts of the Northern Ireland Protocol	31
Violation of Article 4 of the Withdrawal Agreement	32
Failure to act in good faith	32
An unprecedented approach?	33
Consequences of violating international law	35
International law and the rule of law	36
The Bill as an insurance policy	37
Chapter 5: Judicial review	40
Provisions of clause 47	40
The approach of the courts to ouster clauses	41
The implications of clause 47	42

Chapter 6: The Government and the rule of law	43
Duties of ministers	43
The Law Officers	45
Civil service	47
Chapter 7: The rule of law and parliamentary sovereignty	48
Summary of conclusions and recommendations	50
Appendix 1: List of Members and declarations of interest	58
Appendix 2: List of witnesses	60

Evidence is published online at <https://committees.parliament.uk/work/571/uk-internal-market-bill/publications/> and available for inspection at the Parliamentary Archives (020 7219 3074).

Q in footnotes refers to a question in oral evidence.

SUMMARY

The United Kingdom Internal Market Bill is presented as an economic measure to replace the EU single market arrangements at the end of the Brexit transition period. Its effects go far wider than economic management. Given its implications for the devolution arrangements in the UK and the rule of law, it is a Bill of great constitutional significance. Its rule of law implications have received considerable attention, but the impact of the Bill on devolution is at least as significant and, outside the devolved nations, has been much less discussed.

Devolution

The existing devolution arrangements are a delicate mix of constructive ambiguities and balances which for the last twenty years or more, and prior to the stresses put on them by Brexit, have largely worked well. The Bill adopts an unnecessarily heavy-handed approach to reconciling the demands of free trade within the UK and the need to respect the role and responsibilities of devolved institutions. It provides the UK Government with powers that could allow it to alter the competences of the devolved administrations in significant ways. As such, it risks de-stabilising this integral part of the UK's constitutional arrangements—at a time when it has never been more important for central and devolved governments to work together effectively. These powers should be removed or subject to clearer duties of consultation and joint decision-making.

There is no reason why principles for the successful operation of the UK domestic market cannot be arrived at consensually as there is already broad political agreement on the need to avoid erecting new barriers to trade. The UK Government has powers under the European Union (Withdrawal) Act 2018 to achieve this and a programme of agreeing common frameworks with the devolved administrations to determine the future arrangements of the internal market. The devolved administrations are also required by law to adhere to international obligations, such as trade treaties. We believe that these existing powers and processes, combined with strengthening intergovernmental relations mechanisms, can deliver the UK Government's aims without compromising relationships with the devolved administrations or risking consent for its legislation being withheld.

The rule of law

The rule of law requires that everyone—from government ministers to the person on the street—be bound by, and entitled to the benefit of, the law. It is an essential characteristic of a democratic society and a fundamental principle of the UK constitution. The rule of law also includes compliance with international law; treaty obligations are binding on nation states as a matter of international law once they are ratified.

The Bill provides extraordinary delegated powers that the Government acknowledged are for the purpose of breaking international law. Their use could place the UK in contravention of the Withdrawal Agreement and Northern Ireland Protocol agreed with the European Union and implemented by Parliament in domestic law in the European Union (Withdrawal Agreement) Act 2020.

Setting out explicitly to break international law in this way is without precedent. It jeopardises international obligations the UK recently ratified, undermines domestic law and is contrary to the rule of law. The Government has not provided a satisfactory justification for this course of action and we do not consider that there can be one. This constitutionally dangerous approach is compounded by the Government seeking to put these powers beyond the reach of judicial oversight—a step that is also fundamentally at odds with the rule of law.

A government that disregards the rule of law cannot easily restore it. Any diminution of the rule of law is cause for serious concern. Society cannot afford to take this principle for granted or acquiesce in its violation. The rule of law is essential to an open and democratic society and the institutions which embody and protect it. Any government that seeks to secure widespread compliance with the law must itself adhere to it.

United Kingdom Internal Market Bill

CHAPTER 1: INTRODUCTION

The Bill

1. The United Kingdom Internal Market Bill was introduced in the House of Commons on 9 September 2020 and passed on 29 September. It was brought to the Lords on 30 September and second reading is scheduled for 19 October.
2. The Government had said that the purpose of the Bill is to “preserve the UK internal market” at the end of the Brexit transition period. It provides for:
 - the introduction and definition of the principles of mutual recognition and non-discrimination of goods and services, comprising the Market Access Commitment;
 - “unfettered access” of qualifying goods from Northern Ireland to Great Britain;
 - mutual recognition of professional qualifications;
 - the creation of an Office of the Internal Market with responsibility for monitoring the health of the internal market and advising and reporting on it;
 - measures to “clarify specific elements of the Northern Ireland Protocol in domestic law”, concerning tariffs, export procedures and state aid;
 - a uniform approach across the UK to the application of EU state aid law under Article 10 of the Northern Ireland Protocol;
 - a power for the UK Government to provide financial assistance for certain “priority purposes” across the whole of the UK; and
 - reservation of subsidy control to allow the UK Government to regulate the effects of “distortive or harmful subsidies”.¹
3. The aim of protecting the free flow of trade within the United Kingdom, which the Government explains is the purpose of the Bill, is welcome and in itself uncontroversial. The question is how best to achieve this.
4. However, while the Bill is presented as an economic measure, it is also one of profound constitutional significance, primarily for its effects on the devolution arrangements in the UK and its interaction with international law. In this report we explore these issues and other implications of the Bill.
5. In chapter 2 we explore the devolution implications of the Bill. In chapter 3 we consider the effects of individual clauses in greater detail. Chapter 4 examines the issues with clauses that provide powers to ministers to breach international law and in chapter 5 we consider the implications of attempting

¹ United Kingdom Internal Market Bill [HL Bill 135 (2019–21)], [Explanatory Notes](#), para 7

to protect the use of those powers from judicial review. Chapter 6 considers the obligations on the Government to abide by the rule of law and chapter 7 reflects on the balance between the constitutional principles of parliamentary sovereignty and the rule of law.

6. We are grateful to all those who gave evidence to us at short notice to inform our consideration of this Bill.

Consultation and pre-legislative scrutiny

7. The Bill was preceded by the UK Internal Market white paper, published by the Government on 16 July 2020.² It was open for consultation for just four weeks and the Bill was published four weeks after it closed. We have concluded previously that “six weeks should be considered a minimum feasible consultation period, save in circumstances which would be generally recognised as exceptional.”³
8. We wrote to the Lords minister, Lord Callanan, expressing concerns about the proposals in the white paper and in particular the haste at which the Government was intending to proceed and the limited time available for consultation. We said there was “a need for reflection and wide consultation in order to determine the best way forward and one that can maximise consensus between the four nations of the UK.”⁴
9. Our witnesses also expressed concern about the lack of consultation on the Bill. We were told that the devolved administrations were sent a copy of the Bill only one or two days before its publication.⁵ Professor Nicola McEwen, University of Edinburgh, said that time was not allowed:
- “for proper engagement ahead of the introduction of the Bill to try to iron out the devolution aspects that we know will lead to [devolved] parliaments refusing to give their legislative consent. More collaboration earlier on can assist the passage of a piece of legislation, particularly one of this constitutional significance.”⁶
10. Professor Joanne Hunt, University of Cardiff, said that “given the significance of this piece of legislation’s constitutional implications for devolution, the lack of engagement seems particularly egregious.”⁷ Mick Antoniw MS, Chair of the Legislation, Justice and Constitution Committee in the Welsh Parliament, described the Bill as “a constitutional ambush”.⁸ The Finance and Constitution Committee of the Scottish Parliament concluded the UK Government’s “ad hoc” approach to devolution “without sufficient consultation with the devolved institutions and a wider public debate is unsustainable.”⁹

2 Department for Business, Energy & Industrial Strategy, *UK Internal Market*, 16 July 2020, CP 278: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901225/uk-internal-market-white-paper.pdf [accessed 12 October 2020]

3 Constitution Committee, *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017–19, HL Paper 27), para 58

4 [Letter to from the Chair to Lord Callanan, UK Internal Market white paper, 29 July 2020](#)

5 See [Q 20](#) (Professor Nicola McEwen) and [Q 29](#) (Mick Antoniw MS).

6 [Q 23](#) (Professor Nicola McEwen)

7 [Q 23](#) (Professor Joanne Hunt)

8 [Q 28](#) (Mick Antoniw MS)

9 Letter from Bruce Crawford MSP, Convenor, Finance and Constitution Committee, Scottish Parliament, to Rt Hon Michael Gove MP, Chancellor of the Duchy of Lancaster, 6 October 2020: [https://www.parliament.scot/S5_Finance/General%20Documents/FOR_ISSUE_Internal_Market_Bill_LCM_report\(4\).pdf](https://www.parliament.scot/S5_Finance/General%20Documents/FOR_ISSUE_Internal_Market_Bill_LCM_report(4).pdf) [accessed 12 October 2020]

11. We have previously emphasised the importance of consultation and of pre-legislative scrutiny.¹⁰ In our report on *The Process of Constitutional Change* we concluded: “significant constitutional legislation should be subject to pre-legislative scrutiny. This requirement should be departed from only in exceptional circumstances”.¹¹ **While the United Kingdom’s departure from the European Union constitutes an exceptional circumstance, it does not justify failing to consult on the proposals in the United Kingdom Internal Market Bill at an earlier stage.**
12. The United Kingdom voted to leave the European Union on 23 June 2016. A Withdrawal Agreement was finalised by Rt Hon Theresa May MP as Prime Minister on 25 November 2018 and the amended Agreement by her successor Rt Hon Boris Johnson MP on 17 October 2019.¹² Since 2017 extensive discussions on post-Brexit arrangements have taken place between the UK Government and devolved administrations, such as the scoping and development of common frameworks. It is unclear why these internal market proposals were published so close to the end of the transition period on 31 December 2020.
13. **It is regrettable that the consultation on the United Kingdom Internal Market Bill has been so limited. A consultation that is open for four weeks, with a bill published four weeks after it closes, does not allow the Government to engage a wide range of stakeholders; nor does it give time for adequate reflection.**
14. **It is concerning that the devolved institutions consider the engagement they had with the UK Government on these proposals to have been poor. At a time when the Government is seeking to strengthen the Union, the handling of the United Kingdom internal market risks undermining those efforts and reducing trust.**

10 Constitution Committee, *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017–19, HL Paper 27), Chapter 3

11 Constitution Committee, *The Process of Constitutional Change* (15th Report, Session 2010–12, HL Paper 177), para 95

12 Constitution Committee, *European Union (Withdrawal Agreement) Bill* (1st Report, Session 2019–21, HL Paper 5), para 9

CHAPTER 2: THE UK INTERNAL MARKET AND DEVOLUTION

Implications of the Bill for devolution

15. In this chapter we explore the implications of the Bill for the existing devolution arrangements. For an analysis of, and conclusions on, individual clauses, see chapter 3. For consideration of the devolution issues specific to the Northern Ireland Protocol, see chapter 4.
16. The devolved institutions were established in the late 1990s, long after the UK joined the European Union in 1973. The allocation of responsibilities between UK and devolved institutions assumed that many regulatory functions—including to support the integrity of the EU single market—would always be carried out by the European Union. The freedom of devolved governments to legislate differently within their own areas of competence has always therefore been constrained by the need to do so compatibly with EU requirements, including the principles of mutual recognition and non-discrimination.
17. The Government has said that it intends the United Kingdom Internal Market Bill to put in place an equivalent regime following the the end of the Brexit transition period 31 December 2020. Parliament legislated for this eventuality once already. Section 12 of the EU Withdrawal Act 2018 established an explicit restriction on devolved legislative competence in relation to retained EU law insofar as UK ministers make regulations to that effect. The intention of section 12 was to allow the process of agreeing common frameworks to be taken forward to agree UK-wide approaches, where necessary, for the powers flowing back from Brussels to the UK and the devolved territories.

Constraints on devolved competence

18. The Bill imposes new legal restrictions on the devolved administrations in the form of internal market principles relating to goods and services. These are mutual recognition and non-discrimination; together known as Market Access Principles. These principles are intended to mirror single market alignment within the European Union to a large extent.
19. The UK Government maintains that there is no restriction on devolved competence introduced by the Bill because the devolved institutions can continue to regulate economic activity for their territories and within their fields of competence.¹³ However, the Bill takes power to override future devolved legislation. As such, it would limit the scope for the devolved administrations to pursue policy divergence, for example by restricting the “legitimate aims” for which such divergence has previously been permitted by the equivalent provisions of EU law.¹⁴
20. Professor McEwen said the Bill “adds to areas of reserved competence. While it does not take away much of what the devolved legislatures and devolved administrations can do, it limits their scope, and quite explicitly.”¹⁵ Professor Hunt told us: “It has a very real and significant impact on what the devolved

13 See, for example, [Q 20](#) (Professor Joanne Hunt) and HC Deb, 22 September 2020, [col 894](#).

14 See discussion of clause 8 at paras 92–97.

15 [Q 20](#) (Professor Nicola McEwen)

administrations and legislatures are able to do, and the effects that their policy choices are able to have within the field of devolved competence.”¹⁶

21. Mick Antoniw MS said that the ability of the Welsh Parliament “to exercise the powers we have will become significantly restricted and in many ways transferred to the UK Government ... we will not know from one day to the next whether we can legislate and can exercise those powers. We may have the power to do things, but the Bill gives specific legislative competence to the UK Government to override those.”¹⁷
22. These constraints apply unevenly across the UK. The Bill will become a “protected enactment” under the devolution statutes, exempt from modification by the devolved legislatures, and its provisions will automatically override conflicting legislation passed by the devolved administrations. In contrast, the Bill cannot limit the ability of the UK Parliament to amend the Bill’s provisions or pass legislation to bypass its restrictions.
23. The implications for devolved competence will depend heavily on how the UK Parliament sets minimum standards for England, as the economically dominant part of the UK.
24. It will also be determined by future trade deals with the European Union and other countries. International relations is a reserved matter and so the devolved administrations are already under an existing statutory obligation not to act or legislate in a way that is incompatible with the UK’s international obligations. The terms of those agreements will therefore determine the scope for policy divergence between the legislatures in the UK and the extent to which devolved competence is constrained.
25. The measures in the Bill relating to UK market access for goods and services are accompanied by delegated powers so broad the Delegated Powers and Regulatory Reform Committee described them as “extraordinary” and “unprecedented”.¹⁸ In the context of devolution, it is troubling that substantive changes to the UK internal market scheme could be effected by delegated powers, which are subject to relatively limited parliamentary scrutiny and do not require the consent of the devolved legislatures.¹⁹ **As the operation of the devolution arrangements and the respective power of the devolved institutions are constitutional matters, we would expect to see them amended by primary rather than secondary legislation—or by using a statutory procedure that requires the consent of the devolved legislatures. It would also reassure the devolved administrations if changes to the internal market arrangements were subject to the parliamentary scrutiny brought to bear on primary legislation, which allows for amendments to be considered, and over a period of time which permits their views to be heard.**

16 [Q 20](#) (Professor Joanne Hunt)

17 [Q 28](#) and [Q 33](#) (Mick Antoniw MS)

18 Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill* (24th Report, Session 2019–21, HL Paper 130), para 2

19 [Section 30](#) (in combination with [schedule 7](#)) of the Scotland Act 1998 and [section 95](#) of the Government of Wales Act 2006 provide mechanisms for amending the competences of the devolved administrations by secondary legislation. In each case, the consent of the devolved legislature is required.

Limited consultation

26. The use of delegated powers in the Bill to effect potentially significant changes to the competence of the devolved administrations is all the more concerning because only some of the powers require consultation. Where consultation is required, the Bill does not specify the timetable for such consultation, whether the Secretary of State would be required to report on its outcome, or what would happen if there were disagreements between the UK Government and a devolved executive.
27. The lack of any requirement for consultation for other delegated powers is more concerning. Mick Antoniw MS concluded: “There have to be amendments [to the Bill] that would ensure that, at the very least, there is consultation with the devolved nations. There should be a mechanism for consent from the devolved nations and a dispute resolution process.”²⁰
28. The provisions in the Bill contrast unfavourably with section 12 of the European Union (Withdrawal) Act 2018, which provides for joint decision-making between the UK Government and the devolved administrations regarding restrictions on devolved competence for retained EU law.²¹
29. The approach adopted in the Bill is all the more surprising given what the Chancellor of the Duchy of Lancaster, Rt Hon Michael Gove MP, said when launching the UK Internal Market White Paper:
- “This plan is a power surge to the devolved administrations—giving them powers in dozens more areas. As powers flow back from Brussels to the devolved administrations in Edinburgh, Belfast and Cardiff—as well as to the UK government—we want to build on the good progress we have already made. We will develop new ways of working together and learning from each other to help create more opportunities for jobs and investment for businesses and citizens across the United Kingdom.
- “So we will work over the coming weeks with the devolved administrations in Cardiff, Belfast and Edinburgh on a new structure for how we can cooperate better and share ideas, and we will be bringing proposals to the table to agree a way forward. We should be learning from one another, combining the expertise of each nation to share ideas, innovation and, where appropriate, put in place processes for voluntary cooperation.”²²
30. **The lack of specificity about the consultation requirements in the Bill is problematic. The Government must set out the process for consultation with the devolved administrations on the management and adjustment of the internal market arrangements.**
31. **The Government should explain why a joint decision-making process for adjusting the proposed internal market arrangements was not included in the Bill.**

20 Q 35 (Mick Antoniw MS)

21 European Union (Withdrawal) Act 2018, [section 12](#)

22 HM Government, *Government acts to protect jobs in every part of the UK*, 15 July 2020: <https://www.gov.uk/government/news/government-acts-to-protect-jobs-in-every-part-of-the-uk> [accessed 12 October 2020]

Independent oversight, governance and dispute resolution

32. The Bill establishes the Office for the Internal Market (OIM), based in the Competition and Markets Authority, to provide independent advice and monitoring of the internal market. The CMA is a non-ministerial department of the UK Government and the devolved administrations have expressed concern about its status as an independent arbiter for this task.²³
33. The OIM will have limited powers, which it may choose not to exercise,²⁴ and it is unclear what the status of its monitoring and reporting will be—whether its findings will be binding or advisory. It is not clear how disputes relating to the internal market are going to be resolved. As Professor Hunt said:
- “There is very little that we know from the Bill about how disputes are meant to be resolved; whether it is to be intergovernmentally, or whether there is to be a role for the courts. The market access principles and the discrimination principles are referred to as having direct legal effect. The impact assessment makes reference to businesses using them before the courts. It is unclear who the final referee will be when they are making those assessments.”²⁵
34. **It may be that the governance arrangements for policing the internal market will be determined as part of the wider review of inter-governmental relations. However, if that is the UK Government’s intention, it leaves a significant gap in the operation of the United Kingdom Internal Market Bill that must be addressed.**
35. **The Government should explain why the Competition and Markets Authority is the right body to have oversight of the monitoring of the UK internal market and why an Office of the Internal Market could not have been established independently, under the joint control of the UK Government and the devolved administrations.**
36. **The Government should seek to make the Office of the Internal Market more clearly accountable to the different legislatures in the UK.**

UK Government spending

37. The Bill provides the UK Government with a widely-drawn power to invest in devolved areas. Clause 48 permits the UK Government to “provide financial assistance” in any part of the United Kingdom for a range of purposes. These purposes include infrastructure (utilities, transport, health, courts, prisons and housing), promoting economic development, and supporting educational, cultural and sporting activities. Clause 49 sets out how financial assistance may be granted and that it may be subject to conditions.
38. It is not clear how the UK Government intends the power to be used and what consultation there will be with the devolved administrations about this spending. The intention could be to use the power narrowly—for example to implement the Shared Prosperity Fund that will replace EU funding

23 See, for example, [Q 26](#) (Professor Katy Hayward); Welsh Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, 25 September 2020: <https://senedd.wales/laid%20documents/lcm-ld13513/lcm-ld13513-e.pdf> [accessed 12 October 2020]

24 See paras 113–117 for a discussion of clauses 31–34.

25 [Q 21](#) (Professor Joanne Hunt)

streams.²⁶ Alternatively, it might be used by the UK Government to intervene in a wide range of devolved areas.

39. In the white paper that preceded the Bill, the Government said it “would consider which spending powers it needs to enhance the UK internal market, to help people and businesses in each nation to take advantage of it, and to further its ambition to level up every part of the UK.”²⁷ The power in the Bill is framed in broad terms and could apply more widely than to the internal market. **The Government should explain why such a broad power for the UK Government to spend money in devolved territories has been included in this Bill.**
40. Professor McEwen said:
- “it is in part a reflection of the UK Government moving away from what might have been labelled as a ‘devolve and forget’ policy to a ‘devolve and intervene’ policy. It is not at all clear the extent to which that would be in partnership with the devolved administrations or whether it would bypass the devolved administrations to enforce the role and status of the UK Government in those territories, in a bid to strengthen union.”²⁸
41. Mick Antoniw MS raised concern about the power being used to bypass the decisions of devolved administration and questioned whether money spent under this power would be deducted from the block grant funding of the respective devolved administration.²⁹
42. It is appropriate for the UK Government to seek to invest in devolved areas in a proportionate manner, which does not undermine the operation of the block grant. The Government already does so, for example, by co-investing in City and Growth Deals and supporting cultural institutions such as V&A Dundee and the Lloyd George Museum, Llanystumdwy. However, it is important for reasons of democratic accountability that the division of responsibilities for policy and spending between the UK Government and the devolved administrations is clear. These provisions risk blurring the lines of financial accountability.
43. **The Government should explain how it intends to use the power in clause 48 to spend in devolved territories, what the processes would be for consulting the devolved administrations and how any such spending would affect block grant funding.**
44. **If the Government intends to use the power to spend money in devolved areas for limited purposes, it must justify the broad scope of the power, which could be used with less restraint by future governments. In any event, to ensure practical cooperation around the use of the power, the Bill should be amended to include a requirement that ministers, in exercising their power to spend directly in devolved areas, consult with the relevant devolved administration.**

26 The UK Government announced its Union Connectivity Review on 5 October 2020. It is not clear whether this might be one intended use of the power. HM Government, *Union connectivity review*: <https://www.gov.uk/government/speeches/union-connectivity-review> [accessed 12 October 2020]

27 Department for Business, Energy & Industrial Strategy, *UK Internal Market*, 16 July 2020, CP 278, para 47: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901225/uk-internal-market-white-paper.pdf [accessed 12 October 2020]

28 [Q 21](#) (Professor Nicola McEwen)

29 [Q 34](#) (Mick Antoniw MS)

State aid

45. Clause 50 amends the devolution statutes to reserve subsidy controls, equivalent to state aid provision under EU law. The Bill’s explanatory notes state: “This can address the effects of distortive or harmful subsidies, whether that is in relation to international trade or the UK internal market.”³⁰
46. The UK Government maintains that subsidy control/state aid policy is already a reserved matter. However, the devolved administrations contest this position and contest the need for, and constitutionality of, clause 50.³¹

Legislative consent

47. Given the concerns with the Bill, it is perhaps unsurprising that the devolved administrations intend to recommend not giving legislative consent to the Bill. The Welsh Government did not accept that “the measures proposed in the Bill are in any way proportionate to the objectives which the UK Government claims for it” and thinks that they “go far beyond the structure that may be needed to ensure economic and regulatory cooperation between the nations of the UK.” However, it was not opposed to the principle of the internal market or a UK-wide subsidy regime and would publish amendments to address its concerns.³²
48. The Scottish Government said the Bill “undermines both the devolution settlement and agreed processes that are already established to agree common frameworks and ways of working across the UK following EU exit ... it risks more uncertainty and confusion for business and consumers, and encourages harmful deregulation without democratic accountability or proper Parliamentary scrutiny.”³³ The Scottish Parliament voted to refuse consent on 7 October 2020.³⁴
49. The Northern Ireland Executive has not published a legislative consent memorandum. However, the Northern Ireland Assembly voted for a motion that expressed “deep concerns about the UK Government’s approach to negotiations and the terms of the United Kingdom Internal Market Bill” and which mandated the First Minister and deputy First Minister to oppose the Bill.³⁵
50. The lack of legislative consent for a constitutionally significant measure relating to devolution would be regrettable. Until the European Union (Withdrawal) Act 2018, legislative consent had never been withheld. The passage of the Bill in its current form and without the consent of the devolved

30 United Kingdom Internal Market Bill, *Explanatory Notes*, para 297

31 See, for example, Welsh Government, The UK Government’s White Paper on a UK Internal Market, 14 August 2020: <https://business.senedd.wales/documents/s103942/Correspondence%20from%20the%20Counsel%20General%2014%20August%202020.pdf>. For discussion see House of Commons Library, *United Kingdom Internal Market Bill*, BP 9003, 14 September 2020, section 4.4.

32 Welsh Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, 25 September 2020: <https://senedd.wales/laid%20documents/lcm-ld13513/lcm-ld13513-e.pdf> [accessed 12 October 2020]

33 Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, 28 September 2020: https://www.parliament.scot/S5_Finance/General%20Documents/SPLCM-S05-47.pdf [accessed 12 October 2020]

34 Scottish Parliament, Official Report, 7 October 2020: <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12878&i=116422> [accessed 12 October 2020]

35 Northern Ireland Assembly, Official Report, 22 September 2020: <http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2020/09/22&docID=307905#2940318> [accessed 12 October 2020]

legislatures risks destabilising the devolution arrangements. **The UK Government must work intensively with the devolved administrations to amend and clarify the proposals in the Bill in order to give the best chance of securing the legislative consent of the devolved legislatures.**

A way forward

51. The UK Government’s analysis makes clear the UK internal market is already highly integrated—much more so than the EU single market. The analysis also makes clear the considerable economic costs for the devolved territories should there be any disintegration of this market as a result of significant regulatory divergence.³⁶ This would also have damaging consequences for devolved administrations’ budgets that are more reliant on revenues from taxes they control. There are strong incentives to reach agreement.
52. We consider that mechanisms already exist to provide a foundation for preserving a strong and functioning UK domestic market. They are not perfect—we have made recommendations to strengthen them and further work will be needed.³⁷ It will require an intensified effort to finalise common frameworks, a recognition in the Bill of the role of common frameworks and improvements to inter-governmental relations mechanisms.
53. In our report on *The Union and devolution* we set out six principles of Union: solidarity, diversity, consent, responsiveness, subsidiarity and clarity.³⁸ These principles should form the basis for the approach of the UK Government and the devolved administrations in finding a consensual way forward.

Common frameworks

54. The UK Government and the devolved administrations are in the process of drawing up common frameworks to manage the extent of divergence across the UK in policy areas previously determined at EU level.
55. At the start of the process, the Joint Ministerial Committee agreed that there would “be close working between the UK Government and the devolved administrations on reserved and excepted matters that impact significantly on devolved responsibilities.” It agreed principles for common frameworks; that they would “be established where they are necessary in order to
 - enable the functioning of the UK internal market, while acknowledging policy divergence;
 - ensure compliance with international obligations;
 - ensure the UK can negotiate, enter into and implement new trade agreements and international treaties;
 - enable the management of common resources;

36 Department for Business, Energy & Industrial Strategy, *UK Internal Market*, 16 July 2020, CP 278: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901225/uk-internal-market-white-paper.pdf [accessed 12 October 2020]

37 See, for example, Constitution Committee, *Inter-governmental relations in the United Kingdom* (11th Report, Session 2014–15, HL Paper 146); *The Union and devolution* (10th Report, Session 2015–16, HL Paper 149).

38 Constitution Committee, *The Union and devolution* (10th Report, Session 2015–16, HL Paper 149), chapter 4

- administer and provide access to justice in cases with a cross-border element;
- safeguard the security of the UK.

“Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:

- be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent;
- maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules;
- lead to a significant increase in decision-making powers for the devolved administrations.”³⁹

56. Work on the common frameworks has been progressing. It is expected that five to seven frameworks will be operational by the end of 2020.⁴⁰ Professor McEwen contrasted common frameworks with the Bill:

“With common frameworks, where all the administrations participated, it was very much a co-owned process. They explored the problem together and investigated the areas where they felt there was a need to replace EU frameworks with something, whether legislative or non-legislative, for the UK. It was a co-operative process from the outset. With the UK internal market proposals, it was much more top down, and the understanding of the problem was defined at the outset in UK Government terms. It was a different type of process. The engagement was not wholly satisfactory.”⁴¹

57. **We consider that adhering to the principles agreed for formulating common frameworks would improve the likelihood of reaching agreement on how to progress the Bill. We are not convinced that opportunities for managing the UK internal market through the common frameworks process have been exhausted. This contributes to our doubts about the necessity for the Bill.**

58. Our witnesses suggested that the issues the Bill sought to resolve could be addressed through common frameworks. Professor Hunt said: “The common frameworks have not been given the opportunity to demonstrate that they would provide what is needed for the UK’s internal market.”⁴² She said the UK Government needed “to make clear the relationship between the Bill and the common frameworks.”⁴³

39 Joint Ministerial Committee (EU Negotiations), Communiqué, 16 October 2017: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf [accessed 12 October 2020]

40 HC Deb, 15 September 2020, [col 215](#); Scottish Government, *Legislative Consent Memorandum: United Kingdom Internal Market Bill*, 28 September 2020: https://www.parliament.scot/S5_Finance/General%20Documents/SPLCM-S05-47.pdf [accessed 12 October 2020]

41 [Q 23](#) (Professor Nicola McEwen)

42 [Q 21](#) (Professor Joanne Hunt)

43 [Q 25](#) (Professor Joanne Hunt)

59. Professor McEwen explained that the UK Government could use its existing powers to maintain consistency in the internal market while common frameworks were agreed:

“There are powers in the withdrawal agreement that were introduced explicitly to ensure consistency across the UK. There was a political agreement on the part of the UK Parliament legislating for England not to legislate contrary to what was already in EU law ... If that regulatory power was used under the withdrawal agreement to freeze existing EU law, it could be used to hold the line until the common framework was agreed. That does not seem to have been canvassed as an option ... It is obviously conditioned by the deadline of the end of transition, but there are guarantees around continuity already provided by retained EU law, and common frameworks can be given scope to work.”⁴⁴

60. Continuing to use the arrangements provided for by retained EU law may not be a long-term solution for the internal market, but it would provide breathing space for the UK Government and the devolved administrations to negotiate an agreement on how best to proceed. This approach would also allow the possibility of retaining the EU single market principles of subsidiarity and proportionality, which might provide greater reassurance to the devolved administrations on the potential limitations of their competence. Further, it would provide a greater opportunity for the devolved institutions in Northern Ireland to contribute to the common frameworks process, as their input had been limited by the long suspension of the power-sharing arrangements.⁴⁵
61. **The Government should explain why the Bill does not mention common frameworks and how it expects the arrangements for the UK internal market will relate to the common frameworks.**
62. **The Government has failed to explain why a combination of retained EU law, its existing powers to amend that law, and common frameworks could not provide the certainty required at the end of the transition period to secure an effective UK internal market. Such an approach would obviate the need for the Bill.**
63. The Government justifies the Bill in part due to the need to provide certainty for the UK’s trading partners.⁴⁶ International relations are a reserved matter and devolved legislatures and administrations cannot legislate or act, respectively, in ways incompatible with the UK’s international obligations.⁴⁷ UK ministers also have direct powers to intervene if they believe that any action proposed or taken by devolved authorities would be incompatible with any international obligations, ordering such action not to be taken.⁴⁸ Together these protections should be sufficient to satisfy any trading partner that obligations undertaken by the UK will be honoured across the state. It

44 [Q 25](#) (Professor Nicola McEwen)

45 [Q 24](#) (Professor Katy Hayward)

46 Department for Business, Energy & Industrial Strategy, *UK Internal Market*, 16 July 2020, CP 278, paras 45 and 123–124: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901225/uk-internal-market-white-paper.pdf [accessed 12 October 2020]

47 Scotland Act 1998, [section 35](#); Government of Wales Act 2006, [section 101](#); Northern Ireland Act 1998, [section 14](#)

48 Scotland Act 1998, [section 58](#); Government of Wales Act 2006, [section 82](#); Northern Ireland Act 1998, [section 26](#)

is not clear why the further restrictions on devolved competence in the Bill are necessary.

64. **The Government should explain why, given the devolved administrations are required by the devolution statutes to comply with international agreements ratified by the UK, the Bill is needed to ensure adherence to common standards for goods and services arising out of such agreements.**

Strengthening intergovernmental relations

65. We recognise that there are political tensions inherent in these relationships, and that the structures and processes of intergovernmental relations have been put under increasing pressure by the Brexit process and the political differences between the UK Government and the devolved administrations.
66. Professor McEwen said that the “existing machinery of intergovernmental relations is simply not fit for purpose.”⁴⁹ Professor Hunt agreed that a “stronger system of intergovernmental relations” was needed⁵⁰ and Mick Antoniw MS suggested that “a more effective Joint Ministerial Council, properly resourced, with a dispute resolution mechanism” would “take us a long way forward”.⁵¹
67. We have repeatedly recommended improving the operation of intergovernmental relations and the Joint Ministerial Committee.⁵² A review of the Joint Ministerial Committee began more than two years ago and has still not reported.⁵³ The report of the Dunlop review of intergovernmental relations has not been published almost one year after it was completed.⁵⁴
68. While the Government has said that it expects the Dunlop report to be published before the Bill reaches the statute book, it would have been better for it to have been published ahead of the Bill.⁵⁵ A stronger system of intergovernmental relations, with greater trust and collaboration, may have averted some of the difficulties that the Bill has produced. While collaborative working relationships cannot be brought into existence merely by the publication of a report, its publication and a commitment to strengthen intergovernmental relations would be important steps towards building trust.
69. **The need for reform of intergovernmental relations and the lack of progress has damaged the relationship between the UK Government and the devolved administrations. Better Joint Ministerial Committee structures and processes would foster a more open and collaborative approach to dealing with the challenges of operating the devolution arrangements in the new circumstances after EU membership.**

49 [Q 22](#) (Professor Nicola McEwen)

50 [Q 26](#) (Professor Joanne Hunt)

51 [Q 31](#) (Mick Antoniw MS)

52 See, for example, Constitution Committee, *Inter-governmental relations in the United Kingdom* (11th Report, Session 2014–15, HL Paper 146); *The Union and devolution* (10th Report, Session 2015–16, HL Paper 149); *European Union (Withdrawal) Bill* (9th Report, Session 2017–19, HL Paper 69); *Brexit legislation: constitutional issues* (6th Report, Session 2019–21, HL Paper 71).

53 Joint Ministerial Committee (Plenary), Communiqué, 14 March 2018: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/690527/Joint_Ministerial_Committee_communique%CC%81-14_March_2018.pdf [accessed 12 October 2020]

54 Lord Dunlop is a member of the Constitution Committee.

55 Oral evidence taken before the Public Administration and Constitutional Affairs Committee, *The work of the Cabinet Office*, 10 September 2020, [Q 311](#) (Rt Hon Michael Gove MP)

70. **We recommend that the commencement of the United Kingdom Internal Market Bill should not take place before the conclusion of the review of intergovernmental relations and the publication of the Dunlop review.**
71. The Chancellor of the Duchy of Lancaster, Michael Gove MP, expressed willingness to engage with the devolved administrations in a hearing with the Scottish Parliament’s Finance and Constitution Committee:
- “[W]e will seek to properly and better understand any concerns. If there are ways in which the bill can be improved, not least in the House of Lords, we will take the opportunity to do so. The essential purpose of the bill—to make sure that we have a functioning UK internal market—is shared by the Welsh Government and the Northern Ireland Executive. Issues have been raised about aspects of the bill, and we will work in good faith with those administrations to find an answer.”⁵⁶
72. **We welcome the remarks of the Chancellor of the Duchy of Lancaster about listening to the concerns of and working with the devolved administrations on the Bill. These words need to be followed by actions: by amending the Bill, providing clarity and reassurance about some of its provisions, and taking steps to improve inter-governmental relations.**

56 Scottish Parliament Finance and Constitution Committee, Official Report, 29 September 2020: <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12856> [accessed 12 October 2020]

CHAPTER 3: UK MARKET ACCESS AND OVERSIGHT

Introduction

73. The first two Parts of the Bill relate to the UK internal market for goods and services. Chapter 2 considered the effect of these clauses on devolution generally; in this chapter, we focus on individual clauses. The constitutional issues they raise relate to the principles underpinning devolution, delegated powers and the disapplication of the law.
74. The Delegated Powers and Regulatory Reform Committee (DPRRC) reported on the delegated powers in the Bill and we draw on its conclusions to inform our own.⁵⁷ It is necessary to explore these delegated powers in detail not just because of their breadth but because of their potentially significant effect on the balance of powers between the UK Government and the devolved executives.

UK market access: goods

Mutual recognition

75. Clause 2 concerns the mutual recognition of goods within the UK internal market. It provides that a good which complies with the production rules in one part of the UK is recognised as being compliant in the rest of the UK, and can be sold “free from any relevant requirements that would otherwise apply to the sale.”⁵⁸
76. “Relevant requirements” are defined in clause 3 and may be varied by the Secretary of State by regulations under clause 3(8). This delegated power is broadened considerably by the Henry VIII provisions of clause 53(2), which allows ministers, in making regulations under any clause in the Bill, “to amend, repeal or otherwise modify legislation.”
77. Before making regulations under clause 3(8) the Secretary of State must consult the Scottish Ministers, the Welsh Ministers and the Department for the Economy in Northern Ireland.
78. The duty to consult on the making of regulations is vague.⁵⁹ It is unclear what the timetable for any such consultation would be, whether the Secretary of State would be required to report on its outcome and what would happen if there were disagreements between the UK Government and any of the devolved executives. **The Government should explain how the consultation process for amending the relevant requirements for goods would work and how disputes would be resolved.**
79. The DPRRC considered the Government’s reasoning for the power and concluded: “In the absence of a convincing justification for the Henry VIII power in [clause 3(8)], the power is inappropriate and should be removed from the Bill.”⁶⁰ **We agree with the DPRRC that the power in clause 3(8) has not been justified and should be removed from the Bill.**

57 Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill* (24th Report, Session 2019–21, HL Paper 130), para 2

58 United Kingdom Internal Market Bill, [clause 2\(1\)](#)

59 [Q 20](#) (Professor Nicola McEwen)

60 Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill* (24th Report, Session 2019–21, HL Paper 130), paras 9–11

80. Clause 4 sets out certain exclusions from the mutual recognition provision. This takes account of different regulatory requirements across the UK at the time the Act comes into force. In effect, this means that the Bill protects existing divergence provided it exists in only one part of the UK with “no corresponding requirement in force in each of the other three parts of the United Kingdom”.⁶¹ Notably, future “substantive” statutory changes to existing requirements will be subject to the mutual recognition principle.⁶² A list of further exclusions is set out in schedule 1 to the Bill (which is given effect by clause 10). This is a limited list of exclusions; a broader set of exceptions applies in relation to the equivalent principle under EU law.⁶³ The Government does not explain why the Bill provides for such a limited set of exceptions.
81. The Explanatory Notes offer no justification for why the Bill protects existing divergence and not future divergence. The implication of these provisions is that the Government considers that a more restrictive regime is required than the EU arrangements this Bill replaces, as the devolved administrations will be exercising greater powers than previously. However, this is the issue that the common frameworks process is intended to resolve. **The Government should set out its reasons for protecting existing, and not future, divergence and explain the types of divergence clause 4 would protect against that will not be addressed through common frameworks.**
82. There is no definition in the Bill as to the meaning of “substantive” future divergence. **The Government should set out its reasons for protecting existing divergence and explain how it would expect the term “substantive” to be applied to future divergence in regulatory requirements.**

Non-discrimination principle

83. Clause 5(1) provides that “the sale of goods in one part of the United Kingdom should not be affected by relevant requirements that directly or indirectly discriminate against goods that have a relevant connection with another part of the United Kingdom.” This means that goods from one part of the UK cannot be discriminated against in another part of the UK. Clause 5(3) provides that a “relevant requirement” is of no legal effect to the extent that it directly or indirectly discriminates against incoming goods.
84. A “relevant requirement” is defined in clause 6 as a “statutory provision”. This means that existing and future legislation passed by Parliament or by one of the devolved legislatures that sets “relevant requirements” for goods is automatically disappplied within the UK.
85. **If devolved legislation is to be set aside automatically by the Bill, this in effect curtails devolved competence. Such a change should be made only after consultation with the devolved institutions; as we noted at paragraphs 13–14, such engagement has been limited and unsatisfactory.**

61 United Kingdom Internal Market Bill, [clause 4\(2\)](#)

62 United Kingdom Internal Market Bill, [clause 4\(4\)](#)

63 *Reze-Zentral v Bundesmonopolverwaltung für Branntwein* (1979) [Case C-120/78](#) (known as *Cassis de Dijon*)

86. Limits to the competence of the devolved legislatures are set out in the devolution statutes.⁶⁴ The Bill does not amend those Acts to include this restriction in competence. **The Government should explain why the Bill does not amend the devolution statutes explicitly to limit the competence of the devolved legislatures in respect of the non-discrimination principle.**
87. These provisions apply unequally across the UK. While clause 6 defines a “relevant requirement” as a statutory provision, the sovereignty of the UK Parliament means that it could be over-ridden implicitly or explicitly by later statute. **The Government should explain whether clause 6 seeks to constrain Parliament’s law-making power. If clause 6 is not intended to constrain Parliament, the Government should explain why it is not framed more accurately as a limitation only on the devolved legislatures.**
88. **The Government should explain why clause 6 treats legislation intended for England differently from that passed by the devolved legislatures.**
89. Clause 6 sets out the circumstances in which a statutory provision falls within the scope of the non-discrimination principle. These circumstances can be varied by regulations made by the Secretary of State under clause 6(5). Before making such regulations the Secretary of State must consult the Scottish Ministers, the Welsh Ministers and the Department for the Economy in Northern Ireland.
90. Clause 6(5) is another broad Henry VIII power, extended by clause 53(2) so that it may amend, repeal or otherwise modify legislation. As the DPRRC observed, while the Government says the power is needed to “future-proof” the non-discrimination principle, this could be phrased as a power to “completely re-write” the non-discrimination principle. The DPRRC concluded: “In the absence of a convincing justification for the Henry VIII power in clause 6(5), the power is inappropriate and should be removed from the Bill.”⁶⁵ **We agree with the DPRRC that the broad power in clause 6(5) has not been justified and should be removed from the Bill.**
91. Our concern about the unclear requirements for consultation in respect of clause 3(8) (see paragraph 78) also apply to clause 6(5). **If clause 6(5) remains in the Bill, the Government should explain how the consultation process for amending the non-discrimination principle would work and how disputes would be resolved.**

Indirect discrimination

92. Clause 8 defines “indirect discrimination” within the non-discrimination principle. This occurs where a “relevant requirement” displays no direct discrimination but applies to, or in relation to, the incoming goods in a way that puts them at a disadvantage, has an adverse market effect and cannot reasonably be considered a necessary means of achieving a legitimate aim.

64 Scotland Act 1998, Northern Ireland Act 1998, and the Government of Wales Act 1998 (as amended by the Government of Wales Act 2006).

65 Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill* (24th Report, Session 2019–21, HL Paper 130), para 13

93. A “legitimate aim” is defined in clause 8(6). This definition is based on that in EU law—Article 36 of the Treaty on the Functioning of the European Union (TFEU)—but with a more limited list of legitimate aims. Clause 8(6) sets out two legitimate aims: the protection of the life or health of humans, animals or plants; and the protection of public safety or security. Article 36 is broader:

“The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.”⁶⁶

94. It is not clear why a more limited set of legitimate aims has been included in the Bill. **The Government should explain its reasons for the narrower set of legitimate aims in clause 8(6) compared with the equivalent provisions in EU law.**
95. **The House may wish to consider amending the list of legitimate aims in clause 8(6) to include some of the other purposes listed in Article 36 of the Treaty on the Functioning of the European Union.**
96. Clause 8(7) provides that the Secretary of State may by regulations amend the definition of “legitimate aim” in clause 8(6). As with clauses (3)(8) and 6(5), this is a broad power that would allow ministers to alter the definition of indirect discrimination in important ways. The Delegated Powers and Regulatory Reform Committee concluded that this power had not been convincingly justified and should be removed from the Bill.⁶⁷ **We agree with the DPRRC that the power in clauses 8(7) has not been justified and should be removed from the Bill.**
97. Unlike the powers in clauses 3(8) and 6(5), there is no duty to consult the devolved administrations in making regulations under clause 8(7). **If clause 8(7) remains in the Bill, the Government should explain why there is no duty to consult the devolved administration in respect of the power in clauses 8(7). In our view the Bill should be amended to include such a duty.**

Exclusions

98. Clause 9 excludes certain statutory provisions from the non-discrimination principle. This provision is similar to the exclusions relating to mutual recognition in clause 4, in that it seeks to protect existing differences unless they are later substantively changed. As with clause 4, it is not clear why the Bill protects existing divergence and not future divergence, and nor is a definition of “substantive” provided (see paragraph 82). **The Government should set out its reasoning for protecting existing divergence and explain how it would expect the term “substantive” to be applied to future divergence. As with clause 4, the Government should explain what purpose is served by clause 9 that could not be achieved using common frameworks.**

⁶⁶ Treaty on the Functioning of the European Union ([OJ C 326](#))

⁶⁷ Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill* (24th Report, Session 2019–21, HL Paper 130), para 17

99. Clause 10 provides for further exclusions from market access principles, which are set out in schedule 1. The schedule may be amended, or rewritten entirely, by the Secretary of State by regulations. Changes to schedule 1 could have considerable implications for the devolution arrangements; there is no duty on the Secretary of State to consult the devolved administrations before introducing such regulations. **The Government should justify why there is no consultation requirement for the exercise of the power in clause 10(2). In our view the Bill should be amended to include such a duty.**
100. The DPRRC concluded that the Government had failed to offer a convincing justification for the power in clause 10(2) and recommended it be removed from the Bill.⁶⁸ **We agree with the DPRRC that the power in clause 10(2) to amend schedule 1 is inappropriately wide and should be removed from the Bill.**

Supplementary provisions

101. Clause 12 provides that the Secretary of State may issue guidance on any matter relating to “the practical operation of the United Kingdom market access principles”. Guidance may be “directed towards the public generally or towards any description of persons (such as traders, persons with enforcement functions or a class of such traders or persons).” It includes the power to revise or withdraw the guidance. The Secretary of State must arrange for the publication of such guidance or any revision or withdrawal of it.
102. This provision is wide, as the status and implications of such guidance are hard to foresee. No further information is provided in the Bill as to the contents of the guidance or when it is to be published. There is also no requirement on the Secretary of State to consult anyone, including the devolved administrations, in making the guidance. **The Government should explain the need for this power to issue guidance and set out what it could contain and how it would operate. If the Government can justify the power, it should be accompanied by a requirement to consult the devolved administrations before guidance can be issued or changed.**

UK market access: services

Requirements and exclusions

103. Clause 16 limits the application of “authorisation requirements” and “regulatory requirements”. It excludes existing statutory arrangements from the purview of the “authorisation requirements” and “regulatory requirements” set out in later clauses in Part 2 of the Bill. It also excludes later changes to such requirements that are not “substantive”. As identified at paragraphs 82 and 98, no definition of substantive is provided in the Bill. **The Government should explain how it would expect the term “substantive” to be applied to future divergence in regulatory requirements.**
104. Clause 17 concerns exclusions from the definition of “Services” for the purposes of Part 2 of the Bill and to which the principle of mutual recognition

⁶⁸ Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill* (24th Report, Session 2019–21, HL Paper 130), para 20

or non-discrimination do not apply. These are in schedule 2. The Secretary of State is required to keep schedule 2 under review and may by regulations amend the schedule.

105. As with the delegated power in clause 10, this is a Henry VIII power which could be used to rewrite the schedule, and which could have significant implications for the UK internal market and the devolution arrangements. As with clause 10, there is no requirement to consult the devolved administrations on such changes.⁶⁹ **The Government should justify why there is no consultation requirement for the exercise of the power in clause 17(2). In our view the Bill should be amended to include such a duty.**
106. The DPRRC concluded that the Government had failed to offer a convincing justification for the power in this clause and recommended it be removed from the Bill.⁷⁰ **We agree with the DPRRC that the power in clause 17(2) to amend schedule 2 is inappropriately wide and that it should be removed from the Bill.**
107. Regulations under clause 17 can, for the first three months after the Act comes into force, be made using the made affirmative procedure. This allows law to be made with no initial parliamentary scrutiny, subject only to later parliamentary approval. We have concluded previously that the Government should seek the made-affirmative resolution procedure sparingly and only for urgent measures.⁷¹ In relation to such an important area of policy, the power to change the law with no prior parliamentary scrutiny is unacceptable. **If clause 17(2) remains in the Bill, it should not allow for regulations under the made affirmative procedure.**

Discrimination in the regulation of services

108. Clause 19 provides that a “regulatory requirement” which directly discriminates against a service provider is of no effect in relation to that service provider. As with clause 6 (see paragraphs 83–91), this appears to be a restriction on devolved competence, as it would automatically set aside conflicting legislation passed by the devolved legislatures and prevent them from legislating to create a new regulatory requirement. **The Government should set out whether it considers that clause 19 restricts devolved competence. It should explain why the Bill does not amend the devolution statutes explicitly if the intent is to limit the competence of the devolved administrations in this way.**
109. As with clause 6, these provisions apply unequally across the UK. **The Government should explain whether clause 19 seeks to constrain Parliament’s law-making power. If clause 19 is not intended to constrain Parliament, the Government should explain why it is not framed more accurately as a limitation only on the devolved legislatures.**

69 [Q 21](#) (Professor Joanne Hunt)

70 Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill* (24th Report, Session 2019–21, HL Paper 130), para 25

71 Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards* (15th Report, Session 2008–09, HL Paper 116), paras 134–139; Constitution Committee, *European Union (Withdrawal) Bill* (9th Report, Session 2017–19, HL Paper 69), paras 220–222; Constitution Committee, *Corporate Insolvency and Governance Bill* (7th Report, Session 2019–21, HL Paper 76), paras 33–39

110. **The Government should explain why clause 19 treats legislation intended for England differently from that passed by the devolved legislatures.**
111. Similarly to clause 8(7), clause 20(7) includes a broad power for the Secretary of State to make regulations amending the list of “legitimate aims” that may permit a regulatory requirement indirectly to discriminate against a service provider (see paragraphs 96–97). The Delegated Powers and Regulatory Reform Committee concluded that these powers had not been convincingly justified and should be removed from the Bill.⁷² **We agree with the DPRRC that the power in 20(7) has not been justified and should be removed from the Bill.**
112. As with clause 8(7), there is no duty on the UK Government to consult the devolved administrations about the use of the clause 20(7) power. **If clause 20(7) remains in the Bill, the Government should justify not including a requirement to consult the devolved administrations in respect of the power in clause 20(7). In our view the Bill should be amended to include such a duty.**

Oversight and monitoring of the internal market

113. The Bill establishes an independent Office for the Internal Market (OIM) within the Competition and Markets Authority (CMA) to provide independent advice on the regulation of the UK internal market: “ensuring that necessary functions are carried out with sufficient independence, impartiality, and visibility”.⁷³ The CMA is the UK’s primary authority regulating competition and consumer affairs. It is a non-ministerial department sponsored by the Department for Business, Energy and Industrial Strategy.
114. Clause 31 provides for the monitoring and reporting functions of the CMA. It sets out requirements for annual and five yearly reviews of the internal market and of the impact of measures to protect it. These reports must be published by the CMA and laid before both Houses of Parliament and the devolved legislatures.
115. Clause 32 provides that the CMA may report on a proposed regulatory provision applying to part of the United Kingdom if requested to do so by a relevant national authority. This is a request by an authority about a provision which it intends to make. A request might be made if a devolved administration felt that the regulatory provision fell within devolved competence and that “the proposal should be further considered in the light of the significance of its potential effects on the operation of the internal market in the United Kingdom.”⁷⁴
116. Clause 33 provides an equivalent reporting power in relation to regulatory provisions which have already been “passed or made”. Clause 34 permits a requesting authority to seek a report on a regulatory provision in force or proposed by a different national authority where it considers it may be “detrimental to the effective operation of the internal market in the United Kingdom”.

72 Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill* (24th Report, Session 2019–21, HL Paper 130), para 17

73 United Kingdom Internal Market Bill, *Explanatory Notes*, para 51

74 United Kingdom Internal Market Bill, *clause 32(3)(b)*

117. These clauses make provision for how the CMA's reports are to be issued and for sharing them with other national authorities. The CMA may decline to issue a report but must give reasons for doing so. It is not clear why the CMA may refuse to provide a report to a devolved administration. **The Government should explain why the Competition and Markets Authority may refuse to report on a provision which might affect the UK internal market and what reasons it would consider acceptable for such a refusal.**
118. Clause 37 provides that the CMA must prepare and publish general advice and information about how it expects to approach the exercise of its functions under clauses 31–34. It gives the CMA considerable discretion, including the power to publish revised or new advice. There is no duty on the CMA to consult on the preparation and publication of its advice and information, nor on its approach to its reporting functions. **The Competition and Markets Authority should be required to consult the UK Government and the devolved administrations on its approach to these duties.**
119. Clause 38 gives the CMA information-gathering powers. A notice to a person required to give information may not require a person “to produce or provide any document or information which the person could not be compelled to produce, or give in evidence, in civil proceedings before the court”; or “to go more than 10 miles from the person’s place of residence, unless the person’s necessary travelling expenses are paid or offered to them.”
120. While there is no provision in the Bill protecting information covered by legal professional privilege (LPP), the Lord Chancellor, Robert Buckland QC MP, told us that this would be protected under the terms by which the CMA operates:
- “The information-gathering powers in this Bill are based upon provisions in the Enterprise Act 2002, which already make it very clear that LPP is excluded from being required to be produced or provided to the Competition and Markets Authority. A notice from the CMA requiring documents or other information to be produced or provided by a person does not extend to any document or information that a person could be compelled to produce or give in evidence in civil proceedings.”⁷⁵
121. **We welcome the confirmation by the Lord Chancellor that information protected by legal professional privilege will not be required to be disclosed to the Competition and Markets Authority under the information-gathering powers in clause 38.**

Northern Ireland Protocol delegated powers

122. Clause 44 grants ministers broad powers to make regulations that change how exit procedures for goods operate when moving from Northern Ireland to Great Britain. Clause 45 grants the Secretary of State similarly broad powers to make regulations disapplying and modifying the effects of Article 10 of the Northern Ireland Protocol. As with the other delegated powers in the Bill, these powers are expanded by the Henry VIII provisions of clause 53(2), which states: “Any power to make regulations under this Act includes power ... to amend, repeal or otherwise modify legislation”.

75 [Q 56](#) (Rt Hon Robert Buckland QC MP)

123. In chapter 4 we consider the effects of these clauses in respect of the UK's domestic and international law obligations. Here, we note that these provisions permit ministers to make regulations that are incompatible with international and domestic law. The DPRRC concluded that these powers “to derogate from any international or domestic law, including any decision of any court of law, cannot be characterised as merely involving detailed and technical matters. It involves matters of the highest public interest, involving questions of law, politics, diplomacy and integrity.”⁷⁶
124. **We agree with the DPRRC that clauses 44(5) and 45(3)(e) are of extraordinary breadth and relate to matters which should not be the subject of secondary legislation. They are constitutionally inappropriate and should be removed from the Bill.**
125. As noted in respect of the other delegated powers in the Bill,⁷⁷ clause 53(2) allows them to amend, repeal or otherwise modify any primary or secondary legislation. This is the most extreme form of Henry VIII clause, representing an indiscriminate rather than targeted approach thus giving extensive powers to ministers. Further, none of the delegated powers are time limited. **We recommend that clause 53(2) is removed from the Bill.**
126. **We agree with the DPRRC that the delegated powers in the United Kingdom Internal Market Bill are “extraordinary” and “unprecedented”, and many of them are constitutionally unacceptable.**

The Belfast/Good Friday Agreement

127. The Prime Minister, Rt Hon Boris Johnson MP, referred to the measures in the Bill as a “legal safety net” for the Belfast/Good Friday Agreement:
- “My job is to uphold the integrity of the UK, but also to protect the Northern Irish peace process and the Good Friday Agreement. To do that, we need a legal safety net to protect our country against extreme or irrational interpretations of the protocol that could lead to a border down the Irish sea in a way that I believe, and I think Members around the House believe, would be prejudicial to the interests of the Good Friday Agreement and prejudicial to the interests of peace in our country.”⁷⁸
128. Professor Katy Hayward told us that the Bill threatened to undermine the “fundamental principles” protecting devolved competence in Northern Ireland under Strand One of the Belfast/Good Friday Agreement and that some feared that it “might stir up tensions and destabilise the peace process”.⁷⁹
129. Within the Northern Ireland Executive, opinions on the Bill and its implications for the Belfast/Good Friday Agreement are divided. Sinn Féin described it as “a direct attack on the Good Friday Agreement and devolution”,⁸⁰ while the Democratic Unionist Party said it was necessary

76 Delegated Powers and Regulatory Reform Committee, *United Kingdom Internal Market Bill* (24th Report, Session 2019–21, HL Paper 130), para 39

77 Except for the commencement powers in clause 56.

78 HC Deb, 9 September 2020, [col 618](#)

79 [Q 24](#) (Professor Katy Hayward)

80 @sinnfeinireland, tweet on 14 September 2020: <https://twitter.com/sinnfeinireland/status/1305573451558719490> [accessed 12 October 2020]

to defend the Union and to correct the “defects in the Northern Ireland Protocol”.⁸¹

130. In a statement following a meeting of the EU-UK Joint Committee in London, European Commission Vice-President Maroš Šefčovič said the: “EU does not accept the argument that the aim of the draft Bill is to protect the Good Friday (Belfast) Agreement. In fact, it is of the view that it does the opposite.”⁸²
131. Professor Katy Hayward told us that there were concerns about clauses 44 and 45, which grant UK ministers broad powers to make regulations modifying and disapplying parts of the Northern Ireland Protocol, without prior approval from Northern Ireland representatives.⁸³ We consider the implications of these clauses for international law in the next chapter.
132. Professor Hayward also drew attention to clause 42(1)(c)(ii), which requires UK authorities to have “special regard” to “the need to facilitate the free flow of goods between Great Britain and Northern Ireland with the aim of ... maintaining and strengthening the integrity and smooth operation of the internal market in the United Kingdom”. She said that this provision was potentially at odds with the Belfast/Good Friday Agreement which states that “the power of the sovereign government with jurisdiction” over Northern Ireland “shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions”, and was founded on “just and equal treatment for the identity, ethos, and aspirations of both communities”.⁸⁴
133. The Lord Chancellor said that the Government was concerned about the threat to businesses and the local economy in Northern Ireland if they were to be required on multiple occasions to demonstrate their compliance with “particular rules and regulations which really have no benefit to the EU”:
- “The passage of domestic legislation is entirely consistent with our sovereignty and with the rule of law, but it will be done only in the context of that threat to the way of life of people in Northern Ireland, a way of life that we have undertaken as one of the parties, to uphold by way of the Belfast/Good Friday Agreement.”⁸⁵
134. **The implications of the provisions of the United Kingdom Internal Market Bill for Northern Ireland are potentially significant. They are also contested and difficult to assess without knowing how they will be used.** The House of Lords European Union Committee has considered these issues in depth throughout the process of Brexit and we look forward to its report on the Bill.⁸⁶

81 Sammy Wilson MP, @eastantrimmp tweet, 9 September 2020: <https://twitter.com/eastantrimmp/status/1303745692830183424> [accessed 12 October 2020]

82 European Commission, *Statement by the European Commission following the extraordinary meeting of the EU-UK Joint Committee*, 10 September 2020: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1607 [accessed 12 October 2020]

83 Q 24 (Professor Katy Hayward)

84 *Ibid.*

85 Q 47 (Rt Hon Robert Buckland QC MP)

86 European Union Committee, *The United Kingdom Internal Market Bill: Part 5* (14th Report, Session 2019–21, HL Paper 147)

CHAPTER 4: INTERNATIONAL LAW

Introduction

135. Part 5 of the Bill authorises breaches of the UK’s international law obligations under the Northern Ireland Protocol and the Withdrawal Agreement. Of particular significance are clauses 44, 45 and 47.
- Clauses 44 and 45 empower ministers to re-interpret and disapply parts of the Northern Ireland Protocol, and to disregard their obligations under domestic and international law to enact the Protocol.
 - Clause 47 changes how the Withdrawal Agreement is given supremacy and direct effect under the European Union (Withdrawal) Act 2018. It seeks to restrict domestic judicial review of the exercise of powers granted in clauses 44 and 45—we consider this in chapter 5.
136. On 8 September 2020 the Secretary of State for Northern Ireland, Rt Hon Brandon Lewis MP, told the House of Commons that the Bill “does break international law in a very specific and limited way”.⁸⁷
137. The rule of law requires a state to comply with its obligations in international law as in domestic law. The introduction and enactment of legislation that results in the UK violating its obligations under international law is therefore cause for serious constitutional concern. Whether that breach is “specific and limited” or otherwise is irrelevant. Any breach of international law threatens to undermine the rule of law and international confidence in future treaty commitments made by the UK Government.

International legal context

138. The Northern Ireland Protocol is a key part of the Withdrawal Agreement which was ratified by the UK Government and the Council of the European Union in January 2020. It sets out how goods will be traded between Northern Ireland and Great Britain after the transition period ends. It applies European Union customs rules (the rules on how goods are traded in and out of the EU) to Northern Ireland. Box 1 summarises the international legal context and highlights some of the UK’s international law obligations under the Withdrawal Agreement and the Northern Ireland Protocol.

Box 1: The Withdrawal Agreement and the Northern Ireland Protocol

A draft agreement on the UK's withdrawal from the EU was agreed on 17 October 2019 (the **Withdrawal Agreement**). The treaty was approved by Parliament and many of its most important provisions were given effect in UK domestic law by the **European Union (Withdrawal Agreement) Act 2020**. The UK's withdrawal from the European Union took effect at 11pm on 31 January 2020. Although the UK has left the EU, the 2020 Act and the Withdrawal Agreement provide that a transition period will apply until 1 January 2021. The 2020 Act provides that during the transition period the main body of EU law continues to have direct effect in the UK and supremacy over any conflicting national rules.

The **Northern Ireland Protocol** forms an “integral part” of the Withdrawal Agreement.⁸⁸ It seeks to avoid the introduction of a hard border on the island of Ireland in the event that no agreement on future relations is reached between the UK and the European Union before the end of the transition period. Under the Northern Ireland Protocol, Northern Ireland will continue to enforce the EU's customs rules and follow its rules on product standards after the transition period has ended. This is intended to make checks on goods travelling from Northern Ireland (a non-EU territory) into the Republic of Ireland (an EU territory) unnecessary.

Article 10 of the Northern Ireland Protocol deals with state aid (the use of public funds to support businesses). It provides that certain provisions of EU law concerning state aid will apply to trade between Northern Ireland and the European Union. Its purpose is to prevent a UK state aid regime that advantages UK firms trading in Northern Ireland relative to EU competitors.

Article 4 of the Withdrawal Agreement requires the UK to ensure that certain provisions of the Withdrawal Agreement, and of EU law, are of direct effect and enforceable in UK law. This requires the UK to enact primary legislation enabling UK courts to enforce provisions of the Withdrawal Agreement (including the Northern Ireland Protocol) and to disapply inconsistent and incompatible provisions of domestic law. The UK complied with its obligations under Article 4 of the Withdrawal Agreement by enacting section 5 of the European Union (Withdrawal Agreement) Act 2020. This inserts a new **section 7A** into the **European Union (Withdrawal) Act 2018** which provides that all rights, powers, liabilities, obligations and restrictions under the Withdrawal Agreement be recognised and enforced in UK law. That gives certain terms of the Withdrawal Agreement and the Northern Ireland Protocol supremacy in UK law over other enactments.

Article 5 of the Withdrawal Agreement imposes a **duty of good faith** on the UK and the EU in carrying out any tasks that flow from the Withdrawal Agreement. It requires that the EU and the UK “take all appropriate measures ... to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement”.

88 HM Government, *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, 19 October 2019: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf [accessed 12 October 2020]

International law violations

139. The Bill explicitly authorises the UK Government to act in ways that would be incompatible with the Withdrawal Agreement and the Northern Ireland Protocol. There are at least three distinct ways in which the Bill could violate the UK’s international law obligations under the Withdrawal Agreement, each of which is considered further below:
- (1) **Disapplication of parts of the Northern Ireland Protocol:** Clauses 44, 45 and 47 of the Bill together authorise UK ministers to make regulations modifying or disapplying parts of the Northern Ireland Protocol.
 - (2) **Violation of Article 4 of the Withdrawal Agreement:** Clause 47(7) of the Bill amends section 7A of the European Union (Withdrawal) Act 2018 and thus ends the domestic supremacy of certain provisions of the Withdrawal Agreement. This amendment would breach the UK’s obligation under Article 4 of the Withdrawal Agreement to ensure that certain provisions of the Withdrawal Agreement, and of EU law, are of direct effect and enforceable under UK law.
 - (3) **Failure to act in good faith:** The Bill may be incompatible with the UK’s obligations to act in good faith under Article 5 of the Withdrawal Agreement.

Disapplication of parts of the Northern Ireland Protocol

140. Clause 44 of the Bill relates to exit procedures—the procedures that apply to goods travelling from Northern Ireland to Great Britain through the customs frontier set out in the Withdrawal Agreement. It empowers ministers to make regulations disapplying or modifying “any exit procedure that is applicable by virtue of the Northern Ireland Protocol or otherwise”.
141. Clause 45 deals with state aid—the use of public funds to support businesses. Article 10 of the Northern Ireland Protocol provides that certain provisions of EU law concerning state aid will apply to trade between Northern Ireland and the European Union. Clause 45 authorises the Secretary of State to make regulations about the interpretation of Article 10 or modifying the effect of or disapplying Article 10.
142. Clause 47(1) of the Bill provides that clauses 44 and 45, and regulations made by ministers under those clauses, are to be regarded as legally effective “notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent”. This removes any ambiguity as to whether clauses 44 and 45 authorise ministers to breach the UK’s international law obligations under the Northern Ireland Protocol.
143. **Clauses 44, 45 and 47 authorise UK ministers to make regulations that would operate notwithstanding, and therefore in violation of, relevant parts of the Northern Ireland Protocol. Any such regulations would place the UK in breach of its international obligations under the Withdrawal Agreement, which includes the Northern Ireland Protocol.**
144. Amendments to the Bill in the House of Commons resulted in a new subsection (4) in clause 56. This provides that clauses 44, 45 and 47 cannot come into force until the House of Commons has voted in favour of their

commencement. **The inclusion of a parliamentary hurdle before clauses 44, 45 and 47 may be commenced does not alter the inconsistency of these powers with the UK’s international obligations under the Withdrawal Agreement and Northern Ireland Protocol.**

Violation of Article 4 of the Withdrawal Agreement

145. Article 4 of the Withdrawal Agreement requires the UK to enact primary legislation ensuring that certain provisions of the Withdrawal Agreement, and of EU law, are directly enforceable under UK law. The UK duly inserted section 7A into the European Union (Withdrawal) Act 2018, giving the relevant provisions of the Withdrawal Agreement priority in UK law.
146. Clause 47(2)(b) provides that “all rights, powers, liabilities, obligations, restrictions, remedies and procedures” recognised and available in domestic law under section 7A of the European Union (Withdrawal) Act 2018 shall cease to be recognised or enforceable in domestic law to the extent that they are overridden by regulations made under clauses 44 and 45.
147. Clause 47(7) of the Bill amends section 7A of the European Union (Withdrawal) Act 2018 so that any regulations made under clauses 44 and 45 prevail in law over any provisions of the Withdrawal Agreement that were once enforceable in UK law under section 7A.
148. **Bringing clause 47 into force would be a repudiation of Article 4 of the Withdrawal Agreement and hence place the UK in immediate violation of its obligations to ensure that certain provisions of the Withdrawal Agreement, and of EU law, are of direct effect and enforceable under UK law.**

Failure to act in good faith

149. Article 5 of the Withdrawal Agreement requires both the UK and the EU to act in good faith in complying with its obligations under the Agreement (which includes the Northern Ireland Protocol). The UK is also bound by the general international law requirement to comply with treaty obligations in good faith, expressed in the maxim *pacta sunt servanda*.⁸⁹ This is a principle of customary international law and therefore binds the UK through its government.
150. The EU considers that, by introducing the Bill, the UK Government violated the UK’s obligations to act in good faith under Article 5 of the Withdrawal Agreement. Ursula von der Leyen, the European Commission president, said that the Bill was “by its very nature a breach of the obligation of good faith laid down in the withdrawal agreement”⁹⁰ and on 1 October 2020 the EU launched legal action against the UK on this basis.
151. The question of when, in a series of preparatory acts, a breach of international law would occur is uncertain. Sir Franklin Berman QC, a barrister specialising in international law and Legal Adviser to the Foreign and Commonwealth Office 1991–99, said: “it is very difficult to say when the breach might happen ... international law recognises [that] a breach is a complex thing. It consists

⁸⁹ Latin ‘Agreements must be kept’.

⁹⁰ European Commission, Press statement by President von der Leyen on the implementation of the Withdrawal Agreement between the EU and the UK, 1 October 2020: https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1800 [accessed 12 October 2020]

of a whole series of acts and actions over a period of time. The breach may not be completed until fairly well down the track.”⁹¹

152. **Whether the making of the Bill by the UK Government, as distinct from either its commencement or the introduction of regulations under clauses 44–45, amounts to a violation of the UK’s obligations to act in good faith remains an open question of public international law.**
153. **The enactment of the Bill in its current form would confer powers on ministers to disapply the Northern Ireland Protocol and unwind the supremacy of the Withdrawal Agreement in domestic law, in breach of Articles 4 and 5 of the Withdrawal Agreement. Notwithstanding the Lord Chancellor’s view that the powers were justified because there “could be a material breach by one of the parties”⁹² of their treaty obligations, as of now this would be incompatible with the UK’s international law obligations to act in good faith.**

An unprecedented approach?

154. Sir Stephen Laws QC, First Parliamentary Counsel 2006–12, provided examples of what he considered to be clear precedents for legislative action violating the UK’s obligations under international law:⁹³
- The Communications Bill 2003, which proposed an absolute ban on political advertising in the broadcast media. The minister introducing the Communications Bill felt unable to give a statement under section 19 of the Human Rights Act 1998 (the HRA) that the Bill was compatible with the UK’s obligations under the European Convention on Human Rights (the Convention) because a judgment of the European Court of Human Rights (ECtHR) had recently concluded that a similar ban was incompatible with the Convention.⁹⁴
 - The House of Lords Reform Bill 2012, which proposed banning serving prisoners from voting in elections to the House of Lords. The then Deputy Prime Minister, Nick Clegg, felt unable to give a statement under section 19 of the HRA, because the ECtHR had recently held such bans to be incompatible with the Convention.⁹⁵
155. Professor Mark Elliott, Professor of Public Law and Chair of the Faculty of Law at the University of Cambridge, considered these examples “irrelevant” for two reasons:
- “[Firstly,] the fact that there are occasions on which the UK has breached its international law obligations does not change the acceptability or otherwise of another occasion on which it breaches those obligations ... Secondly, there is a huge difference between situations such as those that Sir Stephen describes, in which, by and large, there was a risk that

91 [Q 10](#) (Sir Franklin Berman QC)

92 [Q 45](#) (Rt Hon Robert Buckland QC MP)

93 [Q 6](#) (Sir Stephen Laws QC)

94 *VgT (Verein gegen Tierfabrik v Switzerland*, no. [24699/94](#) ECHR 2001-VI). In fact the Appellate Committee of the House of Lords held, dismissing judicial review proceedings, that the provisions of the Communications Act 2003 are consistent with the European Convention on Human Rights: *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [\[2008\] AC 1312](#). The European Court of Human Rights agreed: [\(2013\) 57 EHRR 21](#).

95 House of Lords Reform Bill [HC Bill 52 (2012–13)], [Explanatory Notes](#), para 278

a particular piece of legislation might or might not be compatible with, for example, a judgment of the European Court of Human Rights, and a situation such as the one we face now in which the Government are deliberately and intentionally setting out with the purpose of equipping Ministers to breach international treaty obligations. Those two things seem to me to be of different orders of magnitude entirely.”⁹⁶

156. Sir Franklin Berman QC referred to the examples provided by Sir Stephen as “scattered and limited”.⁹⁷ He emphasised the unique character of the Withdrawal Agreement:

“We are not talking about prescriptions, obligations and rights in general international law, the content of which might be doubtful and subject to some possible dispute. We are talking about a treaty, a bilateral engagement between the United Kingdom and a treaty partner, a treaty which is therefore clear and determinate, and one that was approved by the United Kingdom after a full-scale process involving the creation, by statute, of the necessary internal rules and powers.”⁹⁸

157. Mick Antoniw MS agreed that the Bill was unique. He told us that “it is one thing for Governments to legislate in a way that might be open to challenge as to whether they are in breach of, for example, international obligations; it is completely another thing to specifically legislate for unlawfulness, for illegality.”⁹⁹

158. Introducing the Bill with the explicit recognition it would break international law was criticised by the former Cabinet Secretary, Rt Hon Lord Butler of Brockwell. He said: “no convincing justification has been produced for departing from the agreement with the EU, and the threat to do so is both dishonourable and unwise.”¹⁰⁰

159. Lord Wilson of Dinton, also a former Cabinet Secretary, said:

“At a legal level, it seems extraordinary to have provisions, particularly those such as Clause [47], which would allow Ministers to act in direct contradiction of the rule of law. I can accept that perhaps unlawful acts would not happen until regulations were actually made, but the conception itself seems to me wholly unacceptable and very unusual.”¹⁰¹

160. The Lord Chancellor acknowledged that the measures proposed in the Bill were “extraordinary”:

“There are times in our national life when we face extraordinary sets of circumstances. This is one of those moments, and in extraordinary times sometimes seemingly extraordinary measures have to be taken. That is why we are doing what we are doing.”¹⁰²

161. **Whether or not the UK may have previously breached its obligations under international law does not justify further breaches of**

96 [Q 6](#) (Professor Mark Elliott)

97 [Q 9](#) (Sir Franklin Berman QC)

98 [Q 1](#) (Sir Franklin Berman QC)

99 [Q 39](#) (Mick Antoniw MS)

100 [Q 11](#) (Lord Butler of Brockwell)

101 [Q 11](#) (Lord Wilson of Dinton)

102 [Q 46](#) (Rt Hon Robert Buckland QC MP)

international law under the United Kingdom Internal Market Bill. It does not alter the rule of law implications of doing so.

162. **We consider the proposed breaches of international law in the United Kingdom Internal Market Bill unprecedented. We do not consider a ministerial refusal, due to legal uncertainty, to issue a statement of compatibility under the Human Rights Act 1998 to be analogous to the enactment of legislation authorising direct and unequivocal breaches of a recently concluded bilateral treaty.**

Consequences of violating international law

163. Article 60 of the Vienna Convention on the Law of Treaties (VCLT) provides that a material breach of a bilateral treaty entitles the other party to terminate the treaty or to suspend its operation in whole or in part. A “material breach” is defined by Article 60(3)(b) of the VCLT as a “violation of a provision essential to the accomplishment of the object or purpose of the treaty”.¹⁰³
164. Article 182 of the Withdrawal Agreement provides that the Northern Ireland Protocol is “an integral part” of the Withdrawal Agreement. The Vice-President of the European Commission, Maroš Šefčovič, claimed that enacting clauses 44, 45 and 47 would be an “extremely serious violation of the Withdrawal Agreement and of international law”.¹⁰⁴
165. **Enacting clauses 44, 45 or 47 of the Bill or making regulations under clauses 44 or 45 in contravention of the Northern Ireland Protocol could arguably qualify as material breaches of the Withdrawal Agreement under Article 60 of the Vienna Convention on the Law of Treaties.**
166. A material breach of the Withdrawal Agreement or the Northern Ireland Protocol would entitle the EU to terminate the entire Withdrawal Agreement. As Sir Franklin Berman QC told the Committee:
- “The remedy, if there is a material breach that can be established, is either to set aside the treaty completely or to set aside parts of the treaty completely. It is not straightforward as to how that would be applied, and there would undoubtedly be some dispute between the parties as to what one or the other was entitled to do, but the effect ... is dramatic; it is explosive.”¹⁰⁵
167. **If the Withdrawal Agreement were to be terminated by the EU on the basis of a violation of its terms by the UK, this would unravel the policy behind the European Union (Withdrawal Agreement) Act 2020, passed by Parliament to implement the Agreement and the Northern Ireland Protocol.**
168. **The Bill casts doubt on the UK’s willingness to abide by its international commitments.**

103 Vienna Convention on the law of treaties, concluded at Vienna on 23 May 1969: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> [accessed 14 October 2020]

104 European Commission, *Statement by the European Commission following the extraordinary meeting of the EU-UK Joint Committee*, 10 September 2020: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1607 [accessed 12 October 2020]

105 [Q 5](#) (Sir Franklin Berman QC)

International law and the rule of law

169. On 10 September 2020 the Cabinet Office published the Government’s legal position on the Bill and the Northern Ireland Protocol. This acknowledged 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.”¹⁰⁶ **We agree that the UK is obliged to discharge its treaty obligations in good faith. Such a policy is also part of our standing constitutional arrangements. We have previously concluded that “it is not appropriate for Parliament acting unilaterally as a national legislature to reinterpret ... an international treaty to which the UK has become a party.”**¹⁰⁷
170. The Cabinet Office statement set out the conventional “dualist” doctrine of UK domestic law, under which “treaty obligations only become binding to the extent that they are enshrined in domestic legislation”, and restated the principle of parliamentary sovereignty, concluding that, as a matter of domestic law, there is nothing unlawful in Parliament passing legislation that is in breach of the UK’s obligations under international law.¹⁰⁸ Sir Stephen Laws QC explained:
- “international law is not automatically part of our law and, indeed, must cede to national law because, if it were otherwise ... without the dualist system, Ministers would be able to reach agreements with foreign countries that changed common law or statute without the consent of Parliament, and that should not be allowed.”¹⁰⁹
171. **Viewed exclusively as a statement of domestic law, it is correct that Parliament may enact legislation which violates the UK’s international obligations. However, this does not address the constitutional desirability of doing so.**
172. Sir Franklin Berman QC said that the dualist doctrine did not affect the constitutional significance of the Bill:
- “What we are talking about is not an abstract question of international law; it is a question about the attitude that the United Kingdom, or the present Government or administration, takes towards commitments clearly and formally undertaken and intended to be binding, and commitments of a very recent sort that were undertaken with the cooperation and collaboration of Parliament in its legislative capacity ... It has nothing whatsoever to do with the fact that international law operates on the international plane, domestic law on the domestic plane, but the two interpenetrate with one another from time to time.”¹¹⁰

106 Cabinet Office, *HMG Legal Position: UKIM Bill and Northern Ireland Protocol*, 10 September 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916702/UKIM_Legal_Statement.pdf [accessed 12 October 2020]

107 Constitution Committee, *Third Progress Report* (9th Report, Session 2005–06, HL Paper 151), appendix 3, para 8

108 Cabinet Office, *HMG Legal Position: UKIM Bill and Northern Ireland Protocol*, 10 September 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916702/UKIM_Legal_Statement.pdf [accessed 12 October 2020]

109 [Q 1](#) (Sir Stephen Laws QC)

110 [Q 1](#) (Sir Franklin Berman QC)

173. **It is misleading for the Government’s official legal position to suggest that the dualist doctrine of UK domestic law means that treaty obligations become binding only once they are enshrined in domestic legislation. International law operates, and binds nation states, irrespective of domestic enactment.**
174. The rule of law requires compliance by the state with its obligations in international as well as national law. As Lord Bingham of Cornhill explained in *The Rule of Law*:
- “although international law comprises a distinct and recognisable body of law with its own rules and institutions, it is a body of law complementary to the national laws of individual states, and in no way antagonistic to them; it is not a thing apart; it rests on similar principles and pursues similar ends; and observance of the rule of law is quite as important on the international plane as on the national, perhaps even more so... the rule of law in the international order is, to a considerable extent at least, the domestic rule of law writ large.”¹¹¹
175. The rule of law, whether at domestic or international level, requires that no one be above or exempt from the requirements of the law. A state that enacts, and complies with, clear legal rules secures for its citizens legal certainty and stability. A government that does not comply with the law has far greater opportunities to wield its power arbitrarily. One that routinely disregards its international law obligations will eventually lose the benefits and protections that international agreement can confer.
176. **Any suggestion that the rule of law is not threatened by the Bill because international law is of different legal standing to domestic law under the dualist doctrine is untenable. We agree with Lord Bingham that respect for the rule of law requires respect for international law.**

The Bill as an insurance policy

177. The Lord Chancellor, Robert Buckland QC MP, said that the Bill was a necessary safeguard in preparation for potential breaches by the EU of its obligations under the Withdrawal Agreement:

“it is the Government’s sincere wish and will to carry on negotiating in good faith and to seek an agreement. I am not going to start today imputing bad faith on the part of the EU, but the fact remains that we have not yet reached agreement ... Therefore, the Government have to be realistic about these things. We are now in mid-October, two and a half months from Brexit day. Time is ticking by, and it would be irresponsible of the Government just to fold their arms, sit back and do nothing, and then be presented with a situation where we would end up in a conflict. There could be a material breach by one of the parties and we would have done nothing to prepare ourselves in domestic law to protect the internal market and the integrity of the peace process. Frankly, that would be irresponsible.”¹¹²

¹¹¹ Tom Bingham, *The Rule of Law*, 2010 (London), p 110-111

¹¹² [Q 45](#) (Rt Hon Robert Buckland QC MP)

178. Since the Bill was introduced in the House of Commons, the Government has made various statements seeking to alleviate concerns about Part 5.

- (1) On 14 September 2020 the Prime Minister in his speech on the second reading of the Bill described the provisions in Part 5 as “an insurance policy, and if we reach agreement with our European friends, which I still believe is possible, they will never be invoked”.¹¹³
- (2) On 17 September 2020 the Government stated that it would ask Parliament to support the use of clauses 44, 45 and 47 only if the EU engaged in a material breach of its duties of good faith or other obligations, and thereby undermined the fundamental purpose of the Northern Ireland Protocol.¹¹⁴ The Government confirmed that “in parallel with the use of these provisions it would always activate appropriate formal dispute settlement mechanisms with the aim of finding a solution through this route”.¹¹⁵
- (3) In a letter to the Chair of this Committee, dated 29 September 2020, the Lord Chancellor confirmed the Government’s position:

“the proposed provisions are the actions of a responsible Government to prepare for the worst and in accordance with the most honourable traditions of the British state we cannot allow the peace process or the UK’s internal market to inadvertently be compromised by unintended consequences of the protocol. Against that contingency, the Government considers it appropriate to ask Parliament to provide a means of addressing these issues, if the genuine and earnest attempt by the negotiating team to resolve these conflicts does not succeed.”¹¹⁶

179. Professor Mark Elliott said that these assurances did not alleviate concerns about the Bill’s constitutional consequences:

“If the Government have a serious intent as to limiting the circumstances in which they will exercise the powers, if they are serious that they would only exercise them where that would be permissible under international law, there is a very simple solution, which would mean that we could end this meeting now: they could simply write that into the Bill and say, ‘These will be the conditions for the exercise of the power’. Instead, all that has been offered is an extra-statutory assurance as to when the powers will and will not be exercised.”¹¹⁷

180. The enactment of clauses 44, 45 and 47 would authorise clear violations of the UK’s obligations in international law. The statements by the Government on the circumstances in which the powers in clauses 44, 45 and 47 would be used offer little reassurance, as those statements are not binding. No limitations on the use of these powers have been included in the Bill itself.

113 HC Deb, 14 September 2020, [col 44](#)

114 HM Government, *Government statement on notwithstanding clauses*, 17 September 2020: <https://www.gov.uk/government/publications/government-statement-on-notwithstanding-clauses/government-statement-on-notwithstanding-clauses> [accessed 12 October 2020]

115 *Ibid.*

116 [Letter from Rt Hon Robert Buckland QC MP to the Chair, 29 September 2020](#)

117 [Q 4](#) (Professor Mark Elliott)

181. **Adherence to the rule of law is not negotiable. The Government's assurances do not alter the fact that the Bill authorises conscious and deliberate breaches of the UK's obligations under international law. A government that brandishes the threat of breaching its international obligations, even in "specific and limited" circumstances, is one that undermines the rule of law.**

CHAPTER 5: JUDICIAL REVIEW

182. Clause 47 of the Bill deals with the incompatibility with domestic and international law that might arise from the exercise of the powers granted to ministers under clauses 44 and 45. Clause 47 purports to restrict domestic judicial review of the powers exercised under clauses 44 and 45.

Provisions of clause 47

183. Clause 47(1) provides that any regulations made under clauses 44 or 45 have effect “notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent”.

184. The term “relevant international or domestic law” is defined broadly; it includes:

- (1) the Northern Ireland Protocol,
- (2) any other provision of the Withdrawal Agreement,
- (3) European Union law; or
- (4) “any legislation, convention or rule of international or domestic law whatsoever”.¹¹⁸

185. Clause 47(4) precludes courts and tribunals from questioning the lawfulness or validity of regulations made under clauses 44 or 45 other than in “proceedings on a relevant claim or application” (meaning judicial review claims). This preserves the possibility of judicial review proceedings challenging the lawfulness of those regulations whilst preventing collateral challenge.¹¹⁹

186. The only law explicitly excluded from the broad definition of “relevant international or domestic law” is the Convention rights protected under the Human Rights Act 1998 (the HRA). The apparent consequence is that regulations made under clauses 44 or 45 may be regarded as unlawful only if incompatible or inconsistent with human rights protected under the HRA.

187. However, that consequence does not in fact follow, as clause 47 also modifies two fundamental features of the HRA:

- Clause 47(2)(a) provides that, in making regulations under clauses 44 or 45, ministers will be exempt from their usual duty under section 6(1) of the HRA to act in accordance with Convention rights.
- Clause 47(3) provides that regulations made under clauses 44 or 45 must be treated as if they were “primary legislation” under the HRA. In practice this means that, unlike other forms of delegated legislation, courts will be precluded from quashing regulations made under clauses 44 or 45 that cannot be interpreted compatibly with Convention rights. Courts can, however, seek to interpret those regulations compatibly with the Convention under section 3 of the HRA or, if that is not possible, issue a declaration of incompatibility under section 4 of the

¹¹⁸ United Kingdom Internal Market Bill, [clause 47\(8\)](#)

¹¹⁹ A collateral challenge is an indirect challenge that is not directly in issue in legal proceedings, such as where the invalidity of subordinate legislation is sought to be raised as a defence to a criminal charge.

HRA.¹²⁰ If a court issues a declaration of incompatibility, as “primary legislation” the regulations would continue to have legal effect unless revoked or amended by a minister or an Act of Parliament.

188. The combined effect of these modifications is that the ordinary legal duty on ministers to avoid making regulations that violate Convention rights is explicitly disapplied, and subordinate legislation is given a legal status under the HRA that has previously been reserved only for primary legislation. These are important modifications to the scheme of the HRA. **We are concerned that clause 47 seeks to alter the scheme provided in the HRA without wider consideration of its constitutional implications and compliance with the UK’s international obligations under the Convention.**
189. **The Secretary of State for Business, Energy and Industrial Strategy, Rt Hon Alok Sharma MP, and the Parliamentary Under Secretary of State, Lord Callanan, have each made statements under section 19 of the HRA that the Bill is compatible with the Convention rights. Those statements are difficult to reconcile with clause 47(2)(a), which exempts ministers from their usual duty to act in accordance with Convention rights when making regulations under clauses 44 or 45, and therefore casts doubt on the intended effect of clause 47(2)(a).**
190. Overall, clause 47 appears to seek an unusual outcome. Clause 47(4) expressly preserves the possibility of judicial review proceedings challenging the lawfulness of regulations made under clauses 44 and 45, but clause 47(1) provides that any such regulations will have effect “notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent”, the only exception being the Convention rights protected by the HRA. The practical utility of any HRA challenges would appear to be undermined by clause 47(3): by requiring regulations made under clauses 44 or 45 to be treated as if they were primary legislation for HRA purposes, the court is purportedly prevented from quashing regulations that cannot be interpreted compatibly with Convention rights.

The approach of the courts to ouster clauses

191. Statutory provisions which seek to prohibit judicial review of their exercise are known as ouster clauses. Such clauses give rise to a fundamental tension between the rule of law (which requires access to the law and to the courts, and therefore favours judicial review) and the principle of parliamentary sovereignty, according to which the courts must give effect to the will of Parliament.
192. Over the years, the courts have interpreted such clauses on the basis of a strong presumption that Parliament would not wish to exclude judicial review. There are a number of examples where the courts have interpreted ouster clauses so as to preserve access to the courts in judicial review proceedings.¹²¹
193. Clause 47 does not entirely exclude judicial review of the exercise of the powers granted to ministers under clauses 44 and 45 on procedural grounds. However, it seeks to place significant restrictions on the courts’ powers of review. **Given existing case law on ouster clauses, it is not clear how**

¹²⁰ A declaration of incompatibility is a declaration issued by a court under section 4 of the HRA that legislation is incompatible with the Convention.

¹²¹ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22

a court would seek to interpret a clause that permits the possibility in principle of HRA challenges to regulations made under clauses 44 and 45 whilst limiting the practical utility of any such challenge. This threatens to draw the higher courts into an area of political controversy by requiring them to give meaning to a fundamentally unclear statutory provision.

The implications of clause 47

194. The Lord Chancellor, Robert Buckland QC MP, said:

“while Clause 47 has important qualifications within it, it does not exclude the court’s ability to judicially review these regulations. There was never any intention or effect for there to be a general ouster of judicial review ... regulations made under Clauses 44 and 45 are of course capable of being judicially reviewed under ordinary public law grounds. That includes what I think everybody is familiar with—grounds of vires, rationality, and legitimate expectation. All those questions are entirely legitimate questions that can be raised by applicants who seek to challenge these particular provisions.”¹²²

He added that he would “not tolerate as Lord Chancellor any unintentional—or intentional—slide into tyranny as a result of the potential passage of these measures.”¹²³

195. **We are not persuaded by the Lord Chancellor’s construction of clause 47. Clause 47 preserves, but also places significant limits on, the availability of judicial review.** The statement in clause 47(1) that regulations made under clauses 44–45 “have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent”, read with the broad definition of “relevant international or domestic law” in clause 47(8), would appear to prevent the courts from exercising their normal powers to declare regulations null and void in basic respects—such as if, for example, the regulations were lacking in legal certainty, or purported to create criminal offences without legal authority, or sought to impose retrospective penalties, or discriminated unreasonably. **If enacted, such an exclusion of the judicial function would put ministerial regulation-making powers above the law in an unprecedented manner. It would be an unacceptable breach of the rule of law.**

196. **The rule of law requires that independent courts can adjudicate on the lawfulness of ministerial action. The effects of clause 47 are unclear and relate to a fundamental aspect of the rule of law.**

122 [Q 49](#) (Rt Hon Robert Buckland QC MP)

123 *Ibid.*

CHAPTER 6: THE GOVERNMENT AND THE RULE OF LAW

197. As set out in the preceding chapters, the Bill raises fundamental constitutional questions and violates the rule of law in a number of ways. In this chapter, we consider the responsibilities of ministers and the civil service in this context.

Duties of ministers

198. Government ministers are required to act lawfully. The Cabinet Manual states: “Ministers are under an overarching duty to comply with the law, including international law and treaty obligations, uphold the administration of justice and protect the integrity of public life.”¹²⁴

199. The 2010 Ministerial Code echoed this formulation, referring to “the overarching duty on Ministers to comply with the law including international law and treaty obligations and to uphold the administration of justice.”¹²⁵ The explicit reference to international law and treaty obligations was removed in the 2015 version of the Code, which referred only to an “overarching duty on Ministers to comply with the law”.¹²⁶ The most recent version of the Code, from August 2019, retains this wording.¹²⁷

200. The removal of the reference to international law and treaty obligations was questioned in 2015. Lord Faulks QC, then Minister of State at the Ministry of Justice, confirmed that “a member of the Executive, including a Minister such as myself, is obliged to follow international law, whether it is reflected in the Ministerial Code or not. All Ministers will be aware of their obligations under the rule of law.”¹²⁸ He later reiterated that “The updated Code makes it clear that Ministers must abide by the law. The obligations on Ministers under the law, including international law, remain unchanged.”¹²⁹ This position was confirmed in subsequent case law in 2018, in which the Court of Appeal¹³⁰ found that the removal of the words “involved no change in substance” to the requirements on ministers to comply with international law and treaty obligations.¹³¹ Indeed, as the Court of Appeal noted in the judgment, that was the very submission made by the Government in those proceedings. In response to the judgment, the Cabinet Office made a public statement: “We welcome this decision from the Court of Appeal.”¹³²

124 HM Government, *The Cabinet Manual*, October 2011, para 3.46: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf [accessed 12 October 2020]

125 Cabinet Office, *Ministerial Code*, May 2010, para 1.2: https://web.archive.org/web/20141117105632/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61402/ministerial-code-may-2010.pdf [accessed 12 October 2020]

126 Cabinet Office, *Ministerial Code*, October 2015, para 1.2: https://web.archive.org/web/20160203091350/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468255/Final_draft_ministerial_code_No_AMENDS_14_Oct.pdf [accessed 12 October 2020]

127 Cabinet Office, *Ministerial Code*, August 2019, para 1.3: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf [accessed 12 October 2020]

128 HL Deb, 28 October 2015, cols 1170–71. Lord Faulks is a member of the Constitution Committee.

129 HL Deb, 3 November 2015, col 1522

130 Lord Burnett of Maldon, Lord Chief Justice; Sir Terence Etherton, Master of the Rolls; and Lord Justice Hamblen

131 Gulf Centre for Human Rights, *R (Gulf Centre for Human Rights) vs The Prime Minister and the Chancellor of the Duchy of Lancaster* [2018] EWCA Civ 1855

132 ‘Appeal court rules that ministerial code does not dilute human rights’, *The Guardian*, 1 August 2018: <https://www.theguardian.com/law/2018/aug/01/appeal-court-rules-that-ministerial-code-does-not-dilute-human-rights> [accessed 12 October 2020]

201. The Secretary of State for Northern Ireland told the House of Commons that the United Kingdom Internal Market Bill breaks international law,¹³³ and, as we concluded in chapter 4, the Bill contravenes the rule of law in a number of respects. **Breaches of international law may occur when the ministerial powers under clauses 44 and 45 are exercised to modify or disapply the Northern Ireland Protocol. That would represent a breach by ministers of their duty to comply with the law, as set out in the Cabinet Manual and the Ministerial Code.**
202. Professor Mark Elliott observed that the Ministerial Code was not legally binding but said that:
- “The suggestion that it is compatible with Ministers’ political obligations to treat international obligations in this very cavalier fashion is concerning. Either that is not right and in fact the Ministerial Code still requires respect for international law by Ministers, or, if it does not, it should prompt us to reflect on whether those obligations on Ministers are appropriately framed.”¹³⁴
203. Responsibility for enforcement of the Ministerial Code lies with the Prime Minister. Former Cabinet Secretary Lord O’Donnell explained:
- “The Ministerial Code is what it says on the tin. It is for Ministers. The Prime Minister could rip the thing up and write a different code in which he said, “You can break the law as much as you like”. Politically, that might be unwise, and I think there would be all sorts of questions about it, but this Prime Minister has this Ministerial Code.”¹³⁵
204. The Lord Chancellor said:
- “The Ministerial Code is a matter for determination by the Prime Minister on the advice of the Cabinet Secretary. In this instance, the Cabinet Secretary has determined that Ministers and civil servants are acting in accordance with their obligations under both the Ministerial Code and the Civil Service Code ... I view that that decision is conclusive when it comes to that issue.”¹³⁶
205. He added that he was a minister when the Ministerial Code was revised in 2015, that statements made about the Code at the time (including those made by Lord Faulks as a justice minister) “stand on the record” and that the Government has “relied on that interpretation” of the Code.¹³⁷
206. **We are surprised by the Cabinet Secretary’s determination, referred to by the Lord Chancellor, that ministers have acted in accordance with their responsibilities to comply with the law, given that the Bill authorises various breaches of the UK’s obligations under international law.**
207. **The Government should set out how, if at all, it plans to amend the Ministerial Code to clarify ministers’ duties regarding the rule of law and adherence to international law and treaty obligations.**

133 HC Deb, 8 September 2020, [col 509](#)

134 [Q 7](#) (Professor Mark Elliott)

135 [Q 16](#) (Lord O’Donnell)

136 [Q 51](#) (Rt Hon Robert Buckland QC MP)

137 [Q 52](#) (Rt Hon Robert Buckland QC MP)

The Law Officers

208. The Law Officers—the Attorney General for England and Wales,¹³⁸ the Solicitor General and the Advocate General for Scotland—advise the Government on legal matters, “helping ministers to act lawfully and in accordance with the rule of law.”¹³⁹
209. The role of the Attorney General as the government’s chief legal adviser was summed up by former Attorney General, Lord Mayhew of Twysden, in evidence to us in 2006: “The Attorney General has a duty to ensure that the Queen’s ministers who act in her name, or purport to act in her name, do act lawfully because it is his duty to help to secure the rule of law, the principle requirement of which is that the government itself acts lawfully.”¹⁴⁰ Sir Franklin Berman QC described the law officers as “a crucially important backstop” in circumstances in which a policy was of “dubious legality”.¹⁴¹
210. The Lord Chancellor has a statutory responsibility to uphold the rule of law and may advise the Government when legal issues arise.¹⁴² Lord Wilson of Dinton described the post of Lord Chancellor as “a pillar of our legal system and of the legality of government.”¹⁴³
211. The Attorney General, Suella Braverman QC, said that the Government was acting “in full accordance with UK law and the UK’s constitutional norms” in introducing the Bill,¹⁴⁴ though she acknowledged “there are powers in the Bill which, if and when exercised, will operate to disapply treaty obligations at the international law level.”¹⁴⁵ Her colleague the Advocate General for Scotland, Lord Keen of Elie QC, resigned from the Government stating he could not reconcile his “obligations as a Law Officer” with the policy intentions of the Bill.¹⁴⁶
212. Former Cabinet Secretary Lord Butler of Brockwell said:
- “Let us accept that the Bill breaks the law. The justification of the Attorney-General and the Lord Chancellor, as I understand it, is that it breaks the law in certain respects, but there are circumstances in which that is justified. They have to stand or fall on whether that argument survives and is accepted. If they hold it in good conscience, they are perfectly right and justified in proposing the law and supporting it in

138 The Attorney General for England and Wales is also ex-officio Advocate General for Northern Ireland.

139 HM Government, *The Cabinet Manual*, October 2011, para 6.4: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf [accessed 12 October 2020]

140 Constitution Committee, *Waging war: Parliament’s role and responsibility* (15th Report, Session 2005–06, HL Paper 236), [Minutes of Evidence, Q 211](#)

141 [Q 8](#) (Sir Franklin Berman QC)

142 The Lord Chancellor swears an oath of office to “respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible.” Promissory Oaths Act 1868, as inserted by section 17(2) of the Constitutional Reform Act 2005.

143 [Q 12](#) (Lord Wilson of Dinton)

144 HC Dec, 24 September 2020, [col 1126](#)

145 HC Dec, 24 September 2020, [col 1124](#)

146 Letter from Lord Keen of Elie QC to the Prime Minister, 16 September 2020, reproduced in ‘Senior Law Officer Quits Over Boris Johnson’s Plan To Break International Law’, *Huffington Post*, 16 September 2020: https://www.huffingtonpost.co.uk/entry/lord-keen-brex-it-breaking-international-law-quit_uk_5f61ee4bc5b6e27db1356b2c?z5 [accessed 12 October 2020]

Parliament. Lord Keen felt he could not. The other Law Ministers feel they can, and that is their right.”¹⁴⁷

213. Sir Franklin Berman QC observed that there was a:

“danger in assuming that legal obligation is just a matter for the lawyers ... Legal obligation is a matter for all of those who are involved in the question of compliance and potential noncompliance. It is a dereliction of duty for all those concerned in the process, including in Parliament itself, not to take account of the potential implications [of the Bill], not simply for the United Kingdom’s international obligations but for its international standing.”¹⁴⁸

214. The Lord Chancellor described the distinction as he saw it between his role and that of the Law Officers:

It is for the Law Officers alone ... to advise the Government on legal matters. It is not my function to provide legal advice to the Government ... Their advice has to be the conclusive source of the legal position of the Government. My role is, first, the formal role of guardian of the judiciary and upholder of the rule of law, but that is not something that I do alone. All Ministers have a collective duty to uphold the rule of law. I am the person who is called upon constitutionally, I suppose, to head that duty. That means that in situations where there will be concerns that need to be expressed, I will readily, freely and proactively do that ...

“I would not want it to be thought that the Lord Chancellor goes about second-guessing the views of the law officers ... the Lord Chancellor has a mixed legal political role, which does mean that he or she can use the power of their office to advise, to warn, to encourage ... the role of the Lord Chancellor is somewhat more nebulous than that of the giver of formal legal advice. Drawing that distinction is vitally important if we are to understand the extent of the influence of the Lord Chancellor and what he or she can do in circumstances where there are legitimate concerns about the rule of law.”¹⁴⁹

215. **The Law Officers play a crucial role in advising the Government on the legality of its actions. Other ministers look to them, and to the Lord Chancellor, for guidance on the legal implications of the Government’s actions. Parliament may look to them for legal clarification and reassurance.**

216. **It is essential that the Law Officers maintain the confidence not just of ministerial colleagues but of Parliament and the public. We are concerned that, by endorsing a course of action with the United Kingdom Internal Market Bill which ministers have acknowledged will break international law and the UK’s treaty obligations, this confidence has been undermined.**

147 [Q 19](#) (Lord Butler of Brockwell)

148 [Q 9](#) (Sir Franklin Berman QC)

149 [Q 43](#) (Rt Hon Robert Buckland QC MP)

Civil service

217. Civil servants are subject to the Civil Service Code, which requires them to “comply with the law and uphold the administration of justice.”¹⁵⁰ The Code has a statutory basis under the Constitutional Reform and Governance Act 2010. In Lord O’Donnell’s view, this made it a “different beast” from the Ministerial Code, which “could be ripped up by the Prime Minister and rewritten.”¹⁵¹
218. Following the publication of the Bill, civil servants were told that the Cabinet Secretary, Simon Case, had “determined that, notwithstanding the breach of international law, in executing this course of action agreed collectively by ministers and to be put to parliament, ministers and civil servants are operating in accordance with their obligations under the ministerial code and civil service code.”¹⁵² This was despite the resignation of Sir Jonathan Jones QC as Treasury Solicitor and permanent secretary at the Government Legal Department, whose resignation was attributed to the Government’s approach to the powers in the Bill to overwrite parts of the Northern Ireland Protocol.¹⁵³
219. **Civil servants are under a duty to comply with the law. The Government should not put them in a position where they risk breaching that duty.**

150 HM Government, *The Civil Service code*, 15 March 2015: <https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code> [accessed 12 October 2020]

151 [Q 16](#) (Lord O’Donnell)

152 “Notwithstanding the breach of international law’: government lawyers told internal market bill within civil service rules’, *Civil Service World*, 11 September 2020: <https://www.civilserviceworld.com/professions/article/notwithstanding-the-breach-of-international-law-government-lawyers-told-cab-sec-says-internal-market-bill-within-civil-service-rules> [accessed 12 October 2020]

153 “Top UK government lawyer quits over Brexit withdrawal agreement changes’, *Financial Times*, 8 September 2020: <https://www.ft.com/content/6186bf1c-055b-4de6-a643-4eea763e1b94> [accessed 12 October 2020]

CHAPTER 7: THE RULE OF LAW AND PARLIAMENTARY SOVEREIGNTY

220. The rule of law is a fundamental constitutional principle and an essential component of a free and democratic society. The preceding chapters have shown that the Bill undermines the rule of law in two ways. First, it proposes violations of the UK’s obligations in international law, undermining respect for a rules-based international order (see chapter 4). Second, it purports to place substantial restrictions on the extent to which independent courts can adjudicate on the lawfulness of ministerial action (see chapter 5).
221. The Bill sets the rule of law against another fundamental constitutional principle: parliamentary sovereignty. A V Dicey defined parliamentary sovereignty as “the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”¹⁵⁴ The doctrine of parliamentary legislative supremacy has evolved significantly since the time Dicey wrote, but it remains a core feature of the UK constitution.
222. John Finnis QC, John Larkin QC and Jo Maugham QC have argued that parliamentary sovereignty means that Parliament can enact, and thus ministers can advise and recommend, legislation that breaches international law.¹⁵⁵
223. Sir Stephen Laws QC told us that the propriety of breaching the UK’s international legal obligations was ultimately a political question for Parliament. Whilst there may be “powerful arguments in favour of a UK approach to foreign policy that we will not conduct ourselves in a way that might cause other countries to doubt our capacity to keep our word”, that was “not without the possibility of exceptions. If the Government can make the case for an exception in this case and persuade Parliament to enact something in that sense, it is something they are entitled to do.”¹⁵⁶
224. The Government has sought to emphasise the principle of parliamentary sovereignty in its defence of the Bill, stating that “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.”¹⁵⁷
225. This gives rise to an important constitutional question. If the Bill is compatible with the principle of parliamentary sovereignty, does that immunise the ways in which it undermines the rule of law? Can legislation be both lawful and unconstitutional?

154 A V Dicey, *An Introduction to the Study of the Law of the Constitution* (first published 1885), 10th edn, 1959, London: Macmillan, pp 39–40

155 John Finnis QC and John Larkin QC, ‘Introducing the Internal Market bill isn’t unconstitutional’, *The Spectator*, 10 September 2020: <https://www.spectator.co.uk/article/whatever-its-political-wisdom-introducing-the-internal-markets-bill-is-not-unconstitutional> [accessed 12 October 2020]

156 **Q 1** (Sir Stephen Laws QC)

157 Cabinet Office, *HMG Legal Position: UKIM Bill and Northern Ireland Protocol*, 10 September 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916702/UKIM_Legal_Statement.pdf [accessed 12 October 2020]

226. Professor Mark Elliott said it was possible for legislation to be lawful as a matter of domestic law whilst being unconstitutional:

“Parliament has immense power; it has unlimited power in domestic law because it is sovereign. The reason why our constitution works, or has worked, acceptably well is that parliamentarians have been prepared to exercise a degree of self-restraint. They have been prepared to say, ‘Although we have the power to enact legislation that might have all kinds of draconian consequences, we choose not to’ ... What I am concerned about in relation to this Bill, but also in the broader political context in which it now sits, is that that degree of restraint, and the mutual respect of the different branches of government for each other, seem to me to be closer to a breaking point than is comfortable. That is true of how the Bill treats international law and true of how the Bill treats the courts.”¹⁵⁸

227. Lord Wilson of Dinton echoed this: “Whatever the legal position, the constitutional position is that [the Bill] is an outrage, and the political position is that it is hugely damaging to our reputation internationally.”¹⁵⁹

228. The strength of our constitution depends, to a large extent, on the willingness of key constitutional actors (the executive, Parliament, the Monarch) to refrain from exercising powers that are legally available to them in order to ensure that constitutional principles are upheld. As Professor Mark Elliott has explained:

“The Queen, for instance, does not exercise her legal power to veto legislation by withholding royal assent because she rightly considers herself to be bound by constitutional convention that institutionalised democratic principle. Similarly, while Parliament has, as a matter of orthodox constitutional theory, limitless power to enact and change domestic law, restraint is exercised in order to ensure adherence to relevant constitutional standards. This both requires and ought to give rise to a culture of mutual respect, whereby (for example) Parliament respects the courts’ constitutional role, including that which is entailed in judicial review, just as courts respect Parliament’s constitutional right to make the law.”¹⁶⁰

229. **We do not doubt that Parliament has the legal authority to enact violations of the UK’s international legal obligations. However, it does not follow that such action is consistent with the rule of law. Clauses 44, 45 and 47 explicitly authorise ministers to breach the UK’s obligations in international law and attempt to place significant limits on judicial review of certain regulations made under it. Those clauses represent a disregard for the rule of law.**

158 Q 10 (Professor Mark Elliott)

159 Q 19 (Lord Wilson of Dinton)

160 Professor Mark Elliott, ‘The Internal Market Bill: My Evidence to the House of Lords Constitution Committee’, *Public Law for Everyone*, 24 September 2020: <https://publiclawforeveryone.com/2020/09/24/the-internal-market-bill-my-evidence-to-the-house-of-lords-constitution-committee/> [accessed 12 October 2020]

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Consultation and pre-legislative scrutiny

1. **While the United Kingdom's departure from the European Union constitutes an exceptional circumstance, it does not justify failing to consult on the proposals in the United Kingdom Internal Market Bill at an earlier stage.** (Paragraph 11)
2. **It is regrettable that the consultation on the United Kingdom Internal Market Bill has been so limited. A consultation that is open for four weeks, with a bill published four weeks after it closes, does not allow the Government to engage a wide range of stakeholders; nor does it give time for adequate reflection.** (Paragraph 13)
3. **It is concerning that the devolved institutions consider the engagement they had with the UK Government on these proposals to have been poor. At a time when the Government is seeking to strengthen the Union, the handling of the United Kingdom internal market risks undermining those efforts and reducing trust.** (Paragraph 14)

The UK internal market and devolution

4. **As the operation of the devolution arrangements and the respective power of the devolved institutions are constitutional matters, we would expect to see them amended by primary rather than secondary legislation—or by using a statutory procedure that requires the consent of the devolved legislatures. It would also reassure the devolved administrations if changes to the internal market arrangements were subject to the parliamentary scrutiny brought to bear on primary legislation, which allows for amendments to be considered, and over a period of time which permits their views to be heard.** (Paragraph 25)
5. **The lack of specificity about the consultation requirements in the Bill is problematic. The Government must set out the process for consultation with the devolved administrations on the management and adjustment of the internal market arrangements.** (Paragraph 30)
6. **The Government should explain why a joint decision-making process for adjusting the proposed internal market arrangements was not included in the Bill.** (Paragraph 31)
7. **It may be that the governance arrangements for policing the internal market will be determined as part of the wider review of inter-governmental relations. However, if that is the UK Government's intention, it leaves a significant gap in the operation of the United Kingdom Internal Market Bill that must be addressed.** (Paragraph 34)
8. **The Government should explain why the Competition and Markets Authority is the right body to have oversight of the monitoring of the UK internal market and why an Office of the Internal Market could not have been established independently, under the joint control of the UK Government and the devolved administrations.** (Paragraph 35)
9. **The Government should seek to make the Office of the Internal Market more clearly accountable to the different legislatures in the UK.** (Paragraph 36)

10. **The Government should explain why such a broad power for the UK Government to spend money in devolved territories has been included in this Bill. (Paragraph 39)**
11. **The Government should explain how it intends to use the power in clause 48 to spend in devolved territories, what the processes would be for consulting the devolved administrations and how any such spending would affect block grant funding. (Paragraph 43)**
12. **If the Government intends to use the power to spend money in devolved areas for limited purposes, it must justify the broad scope of the power, which could be used with less restraint by future governments. In any event, to ensure practical cooperation around the use of the power, the Bill should be amended to include a requirement that ministers, in exercising their power to spend directly in devolved areas, consult with the relevant devolved administration. (Paragraph 44)**
13. **The UK Government must work intensively with the devolved administrations to amend and clarify the proposals in the Bill in order to give the best chance of securing the legislative consent of the devolved legislatures. (Paragraph 50)**
14. **We consider that adhering to the principles agreed for formulating common frameworks would improve the likelihood of reaching agreement on how to progress the Bill. We are not convinced that opportunities for managing the UK internal market through the common frameworks process have been exhausted. This contributes to our doubts about the necessity for the Bill. (Paragraph 57)**
15. **The Government should explain why the Bill does not mention common frameworks and how it expects the arrangements for the UK internal market will relate to the common frameworks. (Paragraph 61)**
16. **The Government has failed to explain why a combination of retained EU law, its existing powers to amend that law, and common frameworks could not provide the certainty required at the end of the transition period to secure an effective UK internal market. Such an approach would obviate the need for the Bill. (Paragraph 62)**
17. **The Government should explain why, given the devolved administrations are required by the devolution statutes to comply with international agreements ratified by the UK, the Bill is needed to ensure adherence to common standards for goods and services arising out of such agreements. (Paragraph 64)**
18. **The need for reform of intergovernmental relations and the lack of progress has damaged the relationship between the UK Government and the devolved administrations. Better Joint Ministerial Committee structures and processes would foster a more open and collaborative approach to dealing with the challenges of operating the devolution arrangements in the new circumstances after EU membership. (Paragraph 69)**
19. **We recommend that the commencement of the United Kingdom Internal Market Bill should not take place before the conclusion of the review of intergovernmental relations and the publication of the Dunlop review. (Paragraph 70)**

20. **We welcome the remarks of the Chancellor of the Duchy of Lancaster about listening to the concerns of and working with the devolved administrations on the Bill. These words need to be followed by actions: by amending the Bill, providing clarity and reassurance about some of its provisions, and taking steps to improve inter-governmental relations. (Paragraph 72)**

UK market access and oversight

21. **The Government should explain how the consultation process for amending the relevant requirements for goods would work and how disputes would be resolved. (Paragraph 78)**
22. **We agree with the DPRRC that the power in clause 3(8) has not been justified and should be removed from the Bill. (Paragraph 79)**
23. **The Government should set out its reasons for protecting existing, and not future, divergence and explain the types of divergence clause 4 would protect against that will not be addressed through common frameworks. (Paragraph 81)**
24. **The Government should set out its reasons for protecting existing divergence and explain how it would expect the term “substantive” to be applied to future divergence in regulatory requirements. (Paragraph 82)**
25. **If devolved legislation is to be set aside automatically by the Bill, this in effect curtails devolved competence. Such a change should be made only after consultation with the devolved institutions; as we noted at paragraphs 13–14, such engagement has been limited and unsatisfactory. (Paragraph 85)**
26. **The Government should explain why the Bill does not amend the devolution statutes explicitly to limit the competence of the devolved legislatures in respect of the non-discrimination principle. (Paragraph 86)**
27. **The Government should explain whether clause 6 seeks to constrain Parliament’s law-making power. If clause 6 is not intended to constrain Parliament, the Government should explain why it is not framed more accurately as a limitation only on the devolved legislatures. (Paragraph 87)**
28. **The Government should explain why clause 6 treats legislation intended for England differently from that passed by the devolved legislatures. (Paragraph 88)**
29. **We agree with the DPRRC that the broad power in clause 6(5) has not been justified and should be removed from the Bill. (Paragraph 90)**
30. **If clause 6(5) remains in the Bill, the Government should explain how the consultation process for amending the non-discrimination principle would work and how disputes would be resolved. (Paragraph 91)**
31. **The Government should explain its reasons for the narrower set of legitimate aims in clause 8(6) compared with the equivalent provisions in EU law. (Paragraph 94)**

32. **The House may wish to consider amending the list of legitimate aims in clause 8(6) to include some of the other purposes listed in Article 36 of the Treaty on the Functioning of the European Union. (Paragraph 95)**
33. **We agree with the DPRRC that the power in clauses 8(7) has not been justified and should be removed from the Bill. (Paragraph 96)**
34. **If clause 8(7) remains in the Bill, the Government should explain why there is no duty to consult the devolved administration in respect of the power in clauses 8(7). In our view the Bill should be amended to include such a duty. (Paragraph 97)**
35. **The Government should set out its reasoning for protecting existing divergence and explain how it would expect the term “substantive” to be applied to future divergence. As with clause 4, the Government should explain what purpose is served by clause 9 that could not be achieved using common frameworks. (Paragraph 98)**
36. **The Government should justify why there is no consultation requirement for the exercise of the power in clause 10(2). In our view the Bill should be amended to include such a duty. (Paragraph 99)**
37. **We agree with the DPRRC that the power in clause 10(2) to amend schedule 1 is inappropriately wide and should be removed from the Bill. (Paragraph 100)**
38. **The Government should explain the need for this power to issue guidance and set out what it could contain and how it would operate. If the Government can justify the power, it should be accompanied by a requirement to consult the devolved administrations before guidance can be issued or changed. (Paragraph 102)**
39. **The Government should explain how it would expect the term “substantive” to be applied to future divergence in regulatory requirements. (Paragraph 103)**
40. **The Government should justify why there is no consultation requirement for the exercise of the power in clause 17(2). In our view the Bill should be amended to include such a duty. (Paragraph 105)**
41. **We agree with the DPRRC that the power in clause 17(2) to amend schedule 2 is inappropriately wide and that it should be removed from the Bill. (Paragraph 106)**
42. **If clause 17(2) remains in the Bill, it should not allow for regulations under the made affirmative procedure. (Paragraph 107)**
43. **The Government should set out whether it considers that clause 19 restricts devolved competence. It should explain why the Bill does not amend the devolution statutes explicitly if the intent is to limit the competence of the devolved administrations in this way. (Paragraph 108)**
44. **The Government should explain whether clause 19 seeks to constrain Parliament’s law-making power. If clause 19 is not intended to constrain Parliament, the Government should explain why it is**

- not framed more accurately as a limitation only on the devolved legislatures. (Paragraph 109)**
45. **The Government should explain why clause 19 treats legislation intended for England differently from that passed by the devolved legislatures. (Paragraph 110)**
 46. **We agree with the DPRRC that the power in 20(7) has not been justified and should be removed from the Bill. (Paragraph 111)**
 47. **If clause 20(7) remains in the Bill, the Government should justify not including a requirement to consult the devolved administrations in respect of the power in clause 20(7). In our view the Bill should be amended to include such a duty. (Paragraph 112)**
 48. **The Government should explain why the Competition and Markets Authority may refuse to report on a provision which might affect the UK internal market and what reasons it would consider acceptable for such a refusal. (Paragraph 117)**
 49. **The Competition and Markets Authority should be required to consult the UK Government and the devolved administrations on its approach to these duties. (Paragraph 118)**
 50. **We welcome the confirmation by the Lord Chancellor that information protected by legal professional privilege will not be required to be disclosed to the Competition and Markets Authority under the information-gathering powers in clause 38. (Paragraph 121)**
 51. **We agree with the DPRRC that clauses 44(5) and 45(3)(e) are of extraordinary breadth and relate to matters which should not be the subject of secondary legislation. They are constitutionally inappropriate and should be removed from the Bill. (Paragraph 124)**
 52. **We recommend that clause 53(2) is removed from the Bill. (Paragraph 125)**
 53. **We agree with the DPRRC that the delegated powers in the United Kingdom Internal Market Bill are “extraordinary” and “unprecedented”, and many of them are constitutionally unacceptable. (Paragraph 126)**
 54. **The implications of the provisions of the United Kingdom Internal Market Bill for Northern Ireland are potentially significant. They are also contested and difficult to assess without knowing how they will be used. (Paragraph 134)**

International law

55. **Clauses 44, 45 and 47 authorise UK ministers to make regulations that would operate notwithstanding, and therefore in violation of, relevant parts of the Northern Ireland Protocol. Any such regulations would place the UK in breach of its international obligations under the Withdrawal Agreement, which includes the Northern Ireland Protocol. (Paragraph 143)**
56. **The inclusion of a parliamentary hurdle before clauses 44, 45 and 47 may be commenced does not alter the inconsistency of these**

powers with the UK's international obligations under the Withdrawal Agreement and Northern Ireland Protocol. (Paragraph 144)

57. **Bringing clause 47 into force would be a repudiation of Article 4 of the Withdrawal Agreement and hence place the UK in immediate violation of its obligations to ensure that certain provisions of the Withdrawal Agreement, and of EU law, are of direct effect and enforceable under UK law. (Paragraph 148)**
58. **Whether the making of the Bill by the UK Government, as distinct from either its commencement or the introduction of regulations under clauses 44–45, amounts to a violation of the UK's obligations to act in good faith remains an open question of public international law. (Paragraph 152)**
59. **The enactment of the Bill in its current form would confer powers on ministers to disapply the Northern Ireland Protocol and unwind the supremacy of the Withdrawal Agreement in domestic law, in breach of Articles 4 and 5 of the Withdrawal Agreement. Notwithstanding the Lord Chancellor's view that the powers were justified because there "could be a material breach by one of the parties" of their treaty obligations, as of now this would be incompatible with the UK's international law obligations to act in good faith. (Paragraph 153)**
60. **Whether or not the UK may have previously breached its obligations under international law does not justify further breaches of international law under the United Kingdom Internal Market Bill. It does not alter the rule of law implications of doing so. (Paragraph 161)**
61. **We consider the proposed breaches of international law in the United Kingdom Internal Market Bill unprecedented. We do not consider a ministerial refusal, due to legal uncertainty, to issue a statement of compatibility under the Human Rights Act 1998 to be analogous to the enactment of legislation authorising direct and unequivocal breaches of a recently concluded bilateral treaty. (Paragraph 162)**
62. **Enacting clauses 44, 45 or 47 of the Bill or making regulations under clauses 44 or 45 in contravention of the Northern Ireland Protocol could arguably qualify as material breaches of the Withdrawal Agreement under Article 60 of the Vienna Convention on the Law of Treaties. (Paragraph 165)**
63. **If the Withdrawal Agreement were to be terminated by the EU on the basis of a violation of its terms by the UK, this would unravel the policy behind the European Union (Withdrawal Agreement) Act 2020, passed by Parliament to implement the Agreement and the Northern Ireland Protocol. (Paragraph 167)**
64. **The Bill casts doubt on the UK's willingness to abide by its international commitments. (Paragraph 168)**
65. **We agree that the UK is obliged to discharge its treaty obligations in good faith. Such a policy is also part of our standing constitutional arrangements. We have previously concluded that "it is not appropriate for Parliament acting unilaterally as a national legislature to reinterpret ... an international treaty to which the UK has become a party." (Paragraph 169)**

66. **Viewed exclusively as a statement of domestic law, it is correct that Parliament may enact legislation which violates the UK's international obligations. However, this does not address the constitutional desirability of doing so. (Paragraph 171)**
67. **It is misleading for the Government's official legal position to suggest that the dualist doctrine of UK domestic law means that treaty obligations become binding only once they are enshrined in domestic legislation. International law operates, and binds nation states, irrespective of domestic enactment. (Paragraph 173)**
68. **Any suggestion that the rule of law is not threatened by the Bill because international law is of different legal standing to domestic law under the dualist doctrine is untenable. We agree with Lord Bingham that respect for the rule of law requires respect for international law. (Paragraph 176)**
69. **The enactment of clauses 44, 45 and 47 would authorise clear violations of the UK's obligations in international law. The statements by the Government on the circumstances in which the powers in clauses 44, 45 and 47 would be used offer little reassurance, as those statements are not binding. No limitations on the use of these powers have been included in the Bill itself. (Paragraph 180)**
70. **Adherence to the rule of law is not negotiable. The Government's assurances do not alter the fact that the Bill authorises conscious and deliberate breaches of the UK's obligations under international law. A government that brandishes the threat of breaching its international obligations, even in "specific and limited" circumstances, is one that undermines the rule of law. (Paragraph 181)**

Judicial review

71. **We are concerned that clause 47 seeks to alter the scheme provided in the HRA without wider consideration of its constitutional implications and compliance with the UK's international obligations under the Convention. (Paragraph 188)**
72. **The Secretary of State for Business, Energy and Industrial Strategy, Rt Hon Alok Sharma MP, and the Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy, Rt Hon Lord Callanan, have each made statements under section 19 of the HRA that the Bill is compatible with the Convention rights. Those statements are difficult to reconcile with clause 47(2)(a), which exempts ministers from their usual duty to act in accordance with Convention rights when making regulations under clauses 44 or 45, and therefore casts doubt on the intended effect of clause 47(2)(a). (Paragraph 189)**
73. **Given existing case law on ouster clauses, it is not clear how a court would seek to interpret a clause that permits the possibility in principle of HRA challenges to regulations made under clauses 44 and 45 whilst limiting the practical utility of any such challenge. This threatens to draw the higher courts into an area of political controversy by requiring them to give meaning to a fundamentally unclear statutory provision. (Paragraph 193)**

74. **We are not persuaded by the Lord Chancellor’s construction of clause 47. Clause 47 preserves, but also places significant limits on, the availability of judicial review. The statement in clause 47(1) that regulations made under clauses 44–45 “have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent”, read with the broad definition of “relevant international or domestic law” in clause 47(8), would appear to prevent the Court from exercising its normal powers to declare regulations null and void in basic respects—such as if, for example, the regulations were lacking in legal certainty, or purported to create criminal offences without legal authority, or sought to impose retrospective penalties, or discriminated unreasonably. If enacted, such an exclusion of the judicial function would put ministerial regulation-making powers above the law in an unprecedented manner. It would be an unacceptable breach of the rule of law. (Paragraph 195)**
75. **The rule of law requires that independent courts can adjudicate on the lawfulness of ministerial action. The effects of clause 47 are unclear and relate to a fundamental aspect of the rule of law. (Paragraph 196)**

The Government and the rule of law

76. **Breaches of international law may occur when the ministerial powers under clauses 44 and 45 are exercised to modify or disapply the Northern Ireland Protocol. That would represent a breach by ministers of their duty to comply with the law, as set out in the Cabinet Manual and the Ministerial Code. (Paragraph 201)**
77. **We are surprised by the Cabinet Secretary’s determination, referred to by the Lord Chancellor, that ministers have acted in accordance with their responsibilities to comply with the law, given that the Bill authorises various breaches of the UK’s obligations under international law. (Paragraph 206)**
78. **The Government should set out how, if at all, it plans to amend the Ministerial Code to clarify ministers’ duties regarding the rule of law and adherence to international law and treaty obligations. (Paragraph 207)**
79. **The Law Officers play a crucial role in advising the Government on the legality of its actions. Other ministers look to them, and to the Lord Chancellor, for guidance on the legal implications of the Government’s actions. Parliament may look to them for legal clarification and reassurance. (Paragraph 215)**
80. **It is essential that the Law Officers maintain the confidence not just of ministerial colleagues but of Parliament and the public. We are concerned that, by endorsing a course of action with the United Kingdom Internal Market Bill which ministers have acknowledged will break international law and the UK’s treaty obligations, this confidence has been undermined. (Paragraph 216)**
81. **Civil servants are under a duty to comply with the law. The Government should not put them in a position where they risk breaching that duty. (Paragraph 219)**

The rule of law and parliamentary sovereignty

82. **We do not doubt that Parliament has the legal authority to enact violations of the UK's international legal obligations. However, it does not follow that such action is consistent with the rule of law. Clauses 44, 45 and 47 explicitly authorise ministers to breach the UK's obligations in international law and attempt to place significant limits on judicial review of certain regulations made under it. Those clauses represent a disregard for the rule of law. (Paragraph 229)**

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Beith
 Baroness Corston
 Baroness Drake
 Lord Dunlop
 Lord Faulks
 Baroness Fookes
 Lord Hennessy of Nympsfield
 Lord Howarth of Newport
 Lord Howell of Guildford
 Lord Pannick
 Lord Sherbourne of Didsbury
 Baroness Taylor of Bolton (Chair)
 Lord Wallace of Tankerness

Declarations of interest

Lord Beith
No relevant interests

Baroness Corston
No relevant interests

Baroness Drake
No relevant interests

Lord Dunlop
Author, Dunlop Review into UK Government Union capability (forthcoming)

Lord Faulks
Chair of the Independent Review of Administrative Law

Baroness Fookes
No relevant interests

Lord Hennessy of Nympsfield
No relevant interests

Lord Howarth of Newport
No relevant interests

Lord Howell of Guildford
No relevant interests

Lord Pannick
Represented Ms Gina Miller, in R (Miller) v Secretary of State for Exiting the European Union [2017], and in R (Miller) (Appellant) v The Prime Minister (Respondent) & Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland) [2019]. He also advised the Government on the compatibility of the Communications Bill 2003 with the European Convention on Human Rights and acted for the Secretary of State and the United Kingdom in the legal proceedings which followed the enactment of the 2003 Act.

Lord Sherbourne of Didsbury
No relevant interests

Baroness Taylor of Bolton (Chair)
No relevant interests

Lord Wallace of Tankerness

No relevant interests

A full list of members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Professor Jeff King, University College London, and Professor Stephen Tierney, University of Edinburgh, acted as legal advisers to the Committee. They both declared no relevant interests.

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at <https://committees.parliament.uk/work/571/uk-internal-market-bill> and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order of oral evidence session.

Oral evidence in chronological order

Sir Franklin Berman QC, Essex Court Chambers	QQ 1-10
Professor Mark Elliott, Professor of Public Law and Chair of the Faculty of Law, University of Cambridge	QQ 1-10
Sir Stephen Laws QC, former First Parliamentary Counsel	QQ 1-10
Rt Hon Lord Butler of Brockwell, former Cabinet Secretary	QQ 11-19
Lord O'Donnell, former Cabinet Secretary	QQ 11-19
Lord Wilson of Dinton, former Cabinet Secretary	QQ 11-19
Professor Katy Hayward, Professor of Social Divisions and Conflict, Queen's University Belfast	QQ 20-27
Professor Joanne Hunt, Professor in Law, Cardiff University	QQ 20-27
Professor Nicola McEwen, Professor of Territorial Politics, University of Edinburgh	QQ 20-27
Mick Antoniw MS, Chair of Legislation, Justice and Constitution Committee, Welsh Parliament	QQ 28-41
Rt Hon Robert Buckland MP, Lord Chancellor and Secretary of State for Justice	QQ 42-57