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European Union Committee

14th Report of Session 2019–21

The United Kingdom Internal Market Bill: Part 5

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The European Union Committee

The European Union Select Committee and its five sub-committees are appointed each session to consider EU documents and draft laws; to consider other matters relating to the UK's relationship with the EU, including the implementation of the UK/EU Withdrawal Agreement, and the Government's conduct of negotiations on the United Kingdom's future relationship with the European Union; and to consider matters relating to the negotiation and conclusion of international agreements generally.

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CONTENTS

	<i>Page</i>
Summary	2
Chapter 1: Introduction	5
Chapter 2: The Withdrawal Agreement and the Protocol on Ireland/Northern Ireland	6
Overview: negotiating the Protocol	6
Box 1: EU Committee work on Brexit and Northern Ireland	6
Analysis of the Protocol	8
The objectives of the Protocol	8
The EU Customs Code	9
The United Kingdom internal market	11
State aid	11
The role of the Joint Committee	12
The consent mechanism	13
The status of the Withdrawal Agreement in UK law	13
Box 2: The principles of ‘direct effect’ and ‘primacy’	14
Good faith	15
Safeguards and dispute resolution	15
Chapter 3: The United Kingdom Internal Market Bill	16
The objectives of the Bill	16
Clause 42: Northern Ireland’s place in the UK internal market and customs territory	16
Clause 43: unfettered access	17
Clause 44: export declarations	17
Clauses 45 and 46: State aid	18
Clause 47: incompatibility with international or domestic law	18
Clause 56: commencement	21
Chapter 4: The compatibility of the United Kingdom Internal Market Bill with international law	22
The Government’s legal argument	22
The European Commission’s response	24
Government allegations against the EU	25
The European Union Committee’s letter of 18 September 2020	27
Chapter 5: Conclusions	28
Appendix 1: List of Members and declarations of interest	31
Appendix 2: Letter dated 18 September 2020 from Lord Kinnoull, Chair of the European Union Committee, to Rt Hon Michael Gove MP, Chancellor of the Duchy of Lancaster	34

SUMMARY

The European Union Committee is charged with scrutinising “matters relating to the UK’s relationship with the European Union, including the implementation of the UK/EU Withdrawal Agreement, and the Government’s conduct of negotiations on the United Kingdom’s future relationship with the European Union”. The United Kingdom Internal Market Bill, in particular Part 5, has a direct bearing on these matters, and we have therefore prepared this report to inform the House’s scrutiny of the Bill.

The tensions inherent in the Protocol on Ireland/Northern Ireland were not hidden—they were apparent from the outset. The expectation must therefore have been that the two sides would, in good faith, negotiate a pragmatic compromise, so as to meet the objectives set out in the Recitals and Article 1 of the Protocol: respecting the essential State functions and territorial integrity of the UK; addressing the unique circumstances on the island of Ireland; and protecting the 1998 Belfast/Good Friday Agreement in all its dimensions.

If the Government judges that the EU is not implementing the Protocol in good faith, the Protocol itself and the Withdrawal Agreement provide multi-layered remedies. Moreover, the trade aspects of the Protocol are also subject to a periodic consent mechanism. Should they no longer be acceptable to the people of Northern Ireland, there will be a democratic process by which they can be terminated.

The Government has offered no convincing explanation of why, rather than making use of these safeguards, it has chosen to address its concerns over the implementation of the Protocol by means of the United Kingdom Internal Market Bill, which would confer upon Ministers powers to make regulations that would breach an international agreement that the UK ratified as recently as January 2020.

On 8 September 2020 the Secretary of State for Northern Ireland told the House of Commons that the Bill “break[s] international law in a very specific and limited way”. Since that time, the Government has failed either formally to retract the Secretary of State’s statement of 8 September 2020, or to put forward a coherent or consistent argument to support the lawfulness of the Bill. Until it does so, it is difficult to avoid the conclusion that the Bill does indeed contravene international law.

This breach of international law has been entered into knowingly. The Bill strikes at the heart not only of the Protocol, but of the Withdrawal Agreement.

We acknowledge the Government’s commitment to the Belfast/Good Friday Agreement, and its legitimate concern that a rigid interpretation of the Protocol, by creating barriers between Northern Ireland and Great Britain, could undermine that Agreement. Yet the Belfast/Good Friday Agreement is itself made up of three interlocking strands, supporting North-South, East-West and internal Northern Ireland relationships. All parties to the Agreement, including the United Kingdom Government and the European Union, have an obligation to maintain this delicate balance. But by focusing solely on Northern Ireland’s relationship with the rest of the UK, the Bill fails to reflect that balance, and we therefore consider that in principle, if not in intent, it could also pose a threat to the maintenance of the Belfast/Good Friday Agreement.

As for the wider political context, in bringing forward the Bill the Government alleged that the EU had not been acting in good faith, and in particular, that it had, by withholding third country listing for the United Kingdom, been threatening to prevent the transport of food from Great Britain to Northern Ireland. The Government did not disclose any evidence to support this allegation, which was denied by the EU, nor does the Bill itself touch on this issue. We nonetheless welcome the fact that there has now been progress on this issue.

New clause 56, added to the Bill by the Commons, provides that a further resolution of the House of Commons will be required before a Minister can use the powers contained in Part 5. The clause provides no equivalent role for the House of Lords. Furthermore, the addition of this further domestic safeguard does not alter the Bill's fundamental incompatibility with the Withdrawal Agreement.

Whatever the substance of the disagreements that have arisen in the future relationship negotiations and in the Withdrawal Agreement Joint Committee, the Government's pre-emptive action has, in effect, placed the United Kingdom in the wrong. In the process it has damaged the United Kingdom's international reputation as a defender of the rule of law.

In summary, the Government has not disclosed any evidence that the EU has acted in bad faith; it has not explained why, if the EU has acted in bad faith, it chose not to use the safeguard, arbitration and dispute resolution procedures contained in the Protocol and the Withdrawal Agreement; and it has not explained why it chose instead, by publishing Part 5 of the Bill when it did, to take pre-emptive and unilateral action. In the absence of these explanations, we hope that the Government will, when the Bill is read a second time, indicate a change of heart, and undertake to table amendments to remove Part 5, while giving renewed and more urgent focus to the task of reaching an agreement with the EU both on the future UK-EU relationship, and on the implementation of the Protocol.

The United Kingdom Internal Market Bill: Part 5

CHAPTER 1: INTRODUCTION

1. This report has been prepared by the European Union Select Committee, to inform the House of Lords' consideration of the United Kingdom Internal Market Bill.
2. The European Union Committee is charged with scrutinising “matters relating to the UK’s relationship with the European Union, including the implementation of the UK/EU Withdrawal Agreement, and the Government’s conduct of negotiations on the United Kingdom’s future relationship with the European Union”.¹ The United Kingdom Internal Market Bill, in particular Part 5, has a direct bearing on these matters. We have therefore prepared this report with a view to ensuring that the House, in debating the Bill, is appropriately informed of its implications for the implementation of the Withdrawal Agreement (including the Protocol on Ireland/Northern Ireland) and for the future relationship negotiations.
3. Chapter 2 of this report outlines the context for our consideration of the Bill, describing the relevant provisions of the Withdrawal Agreement and Protocol. It draws on our published reports analysing both documents. Chapter 3 provides a commentary on Part 5 of the Bill, Chapter 4 examines the debate over the compatibility of Part 5 with international law, and Chapter 5 sets out our conclusions.
4. **We make this report to assist the House in its consideration of the United Kingdom Internal Market Bill.**

1 House of Lords Procedure Committee, *1st Report of Session 2019–21* (1st Report, Session 2019–21, HL Paper 29), para 23

CHAPTER 2: THE WITHDRAWAL AGREEMENT AND THE PROTOCOL ON IRELAND/NORTHERN IRELAND

Overview: negotiating the Protocol

5. In December 2016 we published our first substantive report in the wake of the 2016 referendum, on the implications of Brexit for UK-Irish relations, warning that closer UK-Irish relations and stability in Northern Ireland must not become “collateral damage” of Brexit. We pointed out that shared EU membership had been an integral part of efforts to maintain peace on the island of Ireland, and that “the Belfast/Good Friday Agreement assumes that the co-guarantors are both Member States of the EU”.² Since 2016 we have continued to place Northern Ireland front and centre in our scrutiny of the Brexit process, visiting Belfast, Dublin and the border region, and publishing several reports and substantive correspondence addressing issues affecting Northern Ireland. A list of relevant Select Committee work (which does not include the work of sub-committees on related issues, such as agri-food or customs) is given in Box 1.

Box 1: EU Committee work on Brexit and Northern Ireland

- 28 October 2015: the Committee took evidence in the run-up to the referendum from the then Ambassador of Ireland to Great Britain, HE Dan Mulhall.³
- 26 November 2015: the then Chair, Lord Boswell of Aynho, gave evidence to the Northern Ireland Assembly Committee for the Office of the First Minister and deputy First Minister.⁴
- 12 December 2016: the Committee published its report *Brexit: UK-Irish relations* (6th Report, Session 2016–17, HL Paper 76)⁵
- 19 July 2017: the Committee published its report *Brexit: devolution* (4th Report, Session 2017–19, HL Paper 9)⁶
- 27 February 2018: the Committee published a long letter on Brexit: UK-Irish relations follow-up.⁷
- 5 December 2018: the Committee published its report *Brexit: the Withdrawal Agreement and Political Declaration* (24th Report, Session 2017–19, HL Paper 245)⁸

2 European Union Committee, *Brexit: UK-Irish relations* (6th Report, Session 2016–17, HL Paper 76), paras 167 and 178

3 See oral evidence taken before the European Union Committee, 27 October 2015 (Session 2015–16), [QQ 28–40](#) (HE Dan Mulhall).

4 See Northern Ireland Assembly Committee for the Office of the First Minister and deputy First Minister, Oral evidence taken on 26 November 2016: <http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=16072&eveID=9076> [accessed 13 October 2020].

5 European Union Committee, *Brexit: UK-Irish relations* (6th Report, Session 2016–17, HL Paper 76)

6 European Union Committee, *Brexit: devolution* (4th Report, Session 2017–19, HL Paper 9)

7 See letter dated 27 February 2018 from Lord Boswell of Aynho, Chair of the European Union Committee to Rt Hon Karen Bradley MP, Secretary of State for Northern Ireland: <https://old.parliament.uk/documents/lords-committees/eu-select/UK%20Irish%20relations/27-02-18-Lord-Boswell-letter-to-Secretary-of-State-for-Northern-Ireland.pdf> [accessed 13 October 2020].

8 European Union Committee, *Brexit: the Withdrawal Agreement and Political Declaration* (24th Report, Session 2017–19, HL Paper 245)

- 10 January 2020: the Committee published its report *Brexit: the revised Withdrawal Agreement and Political Declaration* (1st Report, Session 2019–21, HL Paper 4)⁹
- 1 June 2020: the Committee published its report *The Protocol on Ireland/Northern Ireland* (9th Report, Session 2019–21, HL Paper 66)¹⁰

6. A key aspect of shared EU membership was the participation of both the United Kingdom and Ireland in the EU’s ‘customs union’, under which a common external tariff is imposed on all goods imported from third countries. This requires the existence of a ‘customs border’ at points of entry into the EU, but the corollary is that once goods have entered the EU there are no internal controls on their movement within the EU Single Market. Our 2016 report underlined how important the absence of such controls between the United Kingdom and Ireland had been to the peace process in Northern Ireland: “Common EU membership laid the groundwork for the development of the peace process, as the border diminished both visibly and psychologically.”¹¹
7. Brexit thus presented a unique challenge. As we formulated it in 2016, “The only way to retain the current open border in its entirety would be either for the UK to remain in the customs union, or for EU partners to agree to a bilateral UK-Irish agreement on trade and customs.” But those options were soon ruled out: in January 2017 the UK Government (in the then Prime Minister Rt Hon Theresa May MP’s Lancaster House speech) ruled out full customs union membership, while the March 2017 European Council, setting out the EU’s negotiating position, affirmed that “there will be no separate negotiations between individual Member States and the United Kingdom on matters pertaining to the withdrawal of the United Kingdom from the Union”.¹²
8. The Joint Report of December 2017,¹³ the first post-referendum political agreement reached by the UK and the EU, following difficult negotiations, stated that “the achievements, benefits and commitments of the peace process will remain of paramount importance”, and that the 1998 Belfast/Good Friday Agreement “must be protected in all its parts”. But it dodged the issue identified in our 2016 report. Paragraph 45, for instance, asserted both the United Kingdom’s commitment to respecting Ireland’s membership of the EU and the customs union, and its commitment to “preserving the integrity of its internal market and Northern Ireland’s place within it”. The difficulty of squaring these commitments, of both upholding Northern

9 European Union Committee, *Brexit: the revised Withdrawal Agreement and Political Declaration* (1st Report, Session 2019–21, HL Paper 4)

10 European Union Committee, *The Protocol on Ireland/Northern Ireland* (9th Report, Session 2019–21, HL Paper 66)

11 European Union Committee, *Brexit: UK-Irish relations* (6th Report, Session 2016–17, HL Paper 76)

12 Notwithstanding the EU’s position on “no separate negotiations”, the United Kingdom and Ireland have successfully concluded a number of bilateral agreements since the referendum on matters pertaining less directly to UK withdrawal, including a Convention on Social Security, a key component of the Common Travel Area. See European Union Committee, *Scrutiny of international agreements: treaties considered on 5 March 2019* (32nd Report, Session 2017–19, HL Paper 306).

13 Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union, 8 December 2017: https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf [accessed 12 October 2020]

Ireland’s place within the United Kingdom and avoiding a hard border on the island of Ireland, has bedevilled UK-EU negotiations ever since.

9. The first iteration of the Protocol, the so-called ‘Backstop’, sought to avoid the establishment of a customs border either on the island of Ireland or in the Irish Sea by keeping the whole United Kingdom within the EU customs union for an indeterminate period. The Backstop would also have denied the United Kingdom the ability to pursue an independent trade policy, and its repeated rejection by the House of Commons precipitated Theresa May’s resignation and her replacement as Prime Minister by Rt Hon Boris Johnson MP in July 2019.
10. The second iteration of the Protocol, agreed in October 2019, by applying the EU customs code only to Northern Ireland, frees the rest of the United Kingdom to pursue an independent trade policy, but in so doing embodies the same contradictions as the Joint Report. The recitals restate the Joint Report’s commitments, for instance that “nothing in this Protocol prevents the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to the rest of the United Kingdom’s internal market”. They also confirm that “Northern Ireland is part of the customs territory of the United Kingdom”, while underlining the “firm commitment” of both the UK and EU to ensuring “no customs and regulatory checks or controls and related physical infrastructure at the border between Ireland and Northern Ireland”.¹⁴
11. These inherent contradictions were not hidden away: they were apparent from the outset, not just in the recitals, but in the substantive articles. In January 2020, in a report published prior to ratification of the Withdrawal Agreement, we clearly set out the “Janus nature” of the Protocol, concluding that “there is tension at the heart of the customs provisions of the Protocol”.¹⁵
12. On 1 June 2020 we published a follow-up report, providing a more detailed analysis of the tensions at the heart of the Protocol.¹⁶ The following paragraphs reflect some of the key findings in that report.

Analysis of the Protocol

The objectives of the Protocol

13. Following on from the recitals, Article 1 of the Protocol sets out its objectives. It states that the Protocol:
 - “is without prejudice to the provisions of the 1998 [Belfast/Good Friday] Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people”;
 - “respects the essential State functions and territorial integrity of the United Kingdom”; and

14 [Withdrawal Agreement](#) (19 October 2019), Protocol on Ireland/Northern Ireland

15 European Union Committee, [Brexite: the revised Withdrawal Agreement and Political Declaration](#) (1st Report, Session 2019–21, HL Paper 4), paras 149–150

16 European Union Committee, [The Protocol on Ireland/Northern Ireland](#) (9th Report, Session 2019–21, HL Paper 66), para 330

- “sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions”.

14. Our report on the Protocol rehearsed these objectives, and continued:

“While not listed as an explicit objective in Article 1, the Protocol is also designed to achieve these aims while protecting the integrity of the EU Single Market. Setting these principles down on paper is one thing; delivering a solution that successfully holds them in balance is quite another. The Protocol must ultimately be viewed through the lens of the peace process, and therefore judged by the impact it has on the people, communities and economic prosperity of Northern Ireland and Ireland.”¹⁷

The EU Customs Code

Goods at risk

15. Articles 5(3) and 5(4) of the Protocol apply EU customs legislation, including the Union Customs Code, to Northern Ireland. To avert what would otherwise be a requirement to pay EU customs duties on all goods entering Northern Ireland from non-EU countries (including Great Britain), Article 5(1) makes it clear that “no customs duties shall be payable for a good brought into Northern Ireland from another part of the United Kingdom by direct transport ... unless that good is at risk of subsequently being moved into the Union”.
16. A logical consequence of Article 5(2), as we stated in our June report, is that “the default position is that all goods, with specific exemptions set out in the Protocol, will be deemed to be ‘at risk’ of moving into the EU Single Market (and therefore subject to customs processes), unless the Joint Committee agrees otherwise”.¹⁸ The exemptions are either that the good “will not be subject to commercial processing in Northern Ireland”, or that it fulfils certain criteria. These are not defined in the Protocol, but Article 5(2) places a requirement upon the Withdrawal Agreement Joint Committee, before the end of the transition period, to establish them, taking into account, among other things, the final destination and use of the good; its nature and value; the nature of the movement; and the incentive for undeclared onward movement into the EU, including incentives resulting from any difference in the duties payable on goods destined for Northern Ireland and those destined for the EU.

Exit summary declarations

17. The Union Customs Code also implies a requirement to complete exit summary declarations on goods moving from Northern Ireland to Great Britain (or third countries), as a ‘Safety and Security Declaration’, which the EU uses to help enforce its international restrictions and prohibitions.

17 European Union Committee, *The Protocol on Ireland/Northern Ireland* (9th Report, Session 2019–21, HL Paper 66)

18 European Union Committee, *The Protocol on Ireland/Northern Ireland* (9th Report, Session 2019–21, HL Paper 66), para 108. The Committee’s examination of the question of goods at risk is set out at paras 99–112 of that report.

18. There has been longstanding uncertainty over the Government’s interpretation of this requirement for exit summary declarations—an uncertainty dating back to the then Secretary of State for Exiting the EU, Rt Hon Stephen Barclay MP’s appearance before the Committee in October 2019, when he first denied and then confirmed that exit summary declarations would be required.¹⁹ Subsequently, in its May 2020 Command Paper on *The UK’s Approach to the Northern Ireland Protocol*, the Government argued:

“It makes no sense for Northern Ireland businesses to be required to complete an export or exit summary declaration as they send goods directly to the rest of the UK. Self-evidently goods being sent away from the Single Market cannot create a back door into it; and any such goods subsequently leaving the UK would be subject to both exit and entry checks anyway en route to their new destination. We believe that this pragmatic approach is a sensible one and should be agreed between the UK and the EU in the Withdrawal Agreement Joint Committee.”²⁰

19. In our June report we concluded as follows:

“Articles 5(3) and 5(4) apply EU customs law, including the Union Customs Code, to Northern Ireland. This includes a requirement for the completion of exit summary declarations on goods moving from Northern Ireland to Great Britain. We therefore concluded in our January 2020 report that ‘exit summary declarations are likely to be required for goods moving from Northern Ireland to Great Britain, unless and until the parties agree alternative arrangements to facilitate the movement of such goods.’”²¹

20. The report acknowledged the concern of Northern Ireland stakeholders over this potential administrative burden, and concluded:

“The Government now argues that Northern Ireland businesses should not be required to complete an exit summary declaration as they send goods directly to the rest of the UK. Given the concerns of Northern Ireland businesses, the EU should take this argument seriously, but the Government in turn needs to explain how such an exemption can be reconciled with the EU’s international obligations under the Union Customs Code. The Government also needs to explain how it will in practice distinguish between goods originating in Northern Ireland, or in Ireland and the rest of the EU, for the purposes of exit summary declarations ... The EU also, as part of its wider commitment to support Northern Ireland, has a duty to ensure that these processes do not place an intolerable burden upon businesses. If exit summary declarations cannot be eliminated, the Joint Committee should consider means to streamline and simplify the process, in particular in the context of declarations for multiple consignments on a single load.”²²

19 Oral evidence taken on 21 October 2019 (Session 2019), [QQ 9–10](#) (Rt Hon Stephen Barclay MP)

20 Cabinet Office, *The UK’s Approach to the Northern Ireland Protocol*, CP 226, (27 May 2020), para 20: <https://www.gov.uk/government/publications/the-uks-approach-to-the-northern-ireland-protocol/the-uks-approach-to-the-northern-ireland-protocol> [accessed 7 October 2020]

21 European Union Committee, *The Protocol on Ireland/Northern Ireland* (9th Report, Session 2019–21, HL Paper 66)

22 *Ibid.*

The United Kingdom internal market

21. Several provisions of the Protocol develop the reference in Article 1(2) to the “territorial integrity of the United Kingdom”, highlighting Northern Ireland’s continuing place within the UK’s customs territory and internal market. Article 4 states that “Northern Ireland is part of the customs territory of the United Kingdom”, and that nothing in the Protocol “shall prevent the UK from including Northern Ireland in the territorial scope of any agreements it may conclude with third countries”. Article 6 states: “Nothing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom’s internal market.”
22. Our report on the Protocol highlighted the “apparent contradiction at its heart”, between Article 5 (which applies the EU Customs Code in Northern Ireland) and Article 6. The Committee called on the Government “to explain how this will be resolved in practice”.²³

State aid

23. Our report noted that Article 10 of the Protocol binds Northern Ireland to a range of the EU’s State aid rules, as set out in Annex 5 to the Protocol. The mechanisms permitting the UK to reimburse customs duties or waive customs debt are also subject to State aid provisions, although, in taking decisions under Article 10, the Commission “shall take the circumstances in Northern Ireland into account as appropriate”. Where the Commission examines information regarding a measure by the UK authorities that may constitute unlawful State aid, it shall ensure that the UK is kept fully informed of the progress and outcome of the examination of that measure.
24. George Peretz QC, Monckton Chambers, in evidence to our Internal Market Sub-Committee, noted that Article 10, read in isolation, appears to imply that any UK measure that has an effect on trade in goods between Northern Ireland and the EU (and Ireland in particular) could be “subject to the full panoply of the EU State aid regime from the end of transition onwards”. Mr Peretz also suggested that in agreeing to Article 10 the Government “did not quite understand what they were signing up to ... because it applies to any UK measure”.²⁴ Dr Sylvia de Mars and Colin Murray, in evidence to the Select Committee, offered a similar view.²⁵
25. Our report on the Protocol therefore concluded:
- “Article 10 and Annex 5 of the Protocol apply EU State aid rules to the United Kingdom in respect of Northern Ireland. Article 5(6) places a requirement on the Commission, in taking decisions under Article 10, to take the circumstances in Northern Ireland into account as appropriate. It will therefore be for the Commission to show sufficient flexibility in its application of State aid rules to ensure that reasonable measures to support the Northern Ireland economy can be taken.

23 European Union Committee, *The Protocol on Ireland/Northern Ireland* (9th Report, Session 2019–21, HL Paper 66), para 172

24 Oral evidence taken before the EU Internal Market Sub-Committee, 5 March 2020 (Session 2019–21) [Q 17](#) (George Peretz QC)

25 Oral evidence taken before the European Union Committee, 11 February 2020 (Session 2019–21) [Q 13](#)

“The effect of Article 10 and Annex 5 is also to apply EU State aid rules to the UK in any instance in which the support at issue affects trade in goods between Northern Ireland and the EU27. Our expert witnesses agree that this could mean that a UK State aid provision applying to the UK in general, which is above the minimum threshold provided by EU law, would be subject to the application of EU State aid rules under the Protocol, and potentially to EU intervention and judicial review.

“The only certain way for the UK to avoid EU intervention in its State aid decisions would be to ensure that its independent State aid policy does not allow for the level of support available to industry to exceed that available under the EU regime.”²⁶

The role of the Joint Committee

26. As we have outlined, the Protocol embodies various legitimate, but potentially conflicting, objectives. On the UK side, there is the objective of maintaining the territorial integrity of the United Kingdom, and its internal market—objectives which the United Kingdom Internal Market Bill seeks to achieve. On the EU side, there is an equally legitimate objective to maintain the integrity of the Single Market and the customs union. And on both sides, there is a genuine determination to maintain prosperity and peace in Northern Ireland—a determination embodied in Article 1(3) of the Protocol, which places a duty on the UK and EU to implement the Protocol in such a way as to protect the Belfast/Good Friday Agreement in “all its dimensions”.
27. As we therefore concluded in our report on the Protocol, published on 1 June 2020:
- “It is incumbent on all parties, including the UK Government, the EU, the Irish Government, and the political parties in Northern Ireland, after the divisions of the past four years, to work in a common endeavour to prioritise and urgently address the interests, stability and prosperity of the people and communities of Northern Ireland.”²⁷
28. The key governance body within which these issues are to be addressed is the Joint Committee, established under Article 164 of the Withdrawal Agreement. This body is co-chaired by a member of the European Commission (Vice President Maroš Šefčovič) and a Government Minister (the Chancellor of the Duchy of Lancaster, Rt Hon Michael Gove MP). It meets at the request of either the UK or the EU, by mutual consent. Its decisions and recommendations are also to be made by mutual consent, and are binding upon both the UK and the EU, having the same legal effect as the Withdrawal Agreement itself.
29. Of particular relevance are the four sets of decisions that the Joint Committee is tasked with taking, before the end of the transition period, with regard to the implementation of the Protocol:
- Defining those goods brought from Great Britain to Northern Ireland that are not subject to commercial processing and are not at risk of onward movement into the EU (Article 5(2) of the Protocol);

26 European Union Committee, *The Protocol on Ireland/Northern Ireland* (9th Report, Session 2019–21, HL Paper 66), para 193

27 European Union Committee, *The Protocol on Ireland/Northern Ireland* (9th Report, Session 2019–21, HL Paper 66), para 330

- Determining the conditions under which fishery and aquaculture products originating in Northern Ireland can be imported into the EU customs territory (Article 5(3));
 - Setting maximum subsidy levels for Northern Ireland agricultural producers (Article 10(2));
 - Deciding on the manner of EU supervision of the implementation of the Protocol (Article 12(3)).²⁸
30. The Joint Committee has met four times: three scheduled meetings in March, June and most recently on 28 September, and an extraordinary meeting on 10 September, which was requested by the EU following the Government’s publication of the United Kingdom Internal Market Bill. We have repeatedly called for greater transparency around meetings of the Joint Committee, but to little avail. What is clear, however, is that progress has been slow, and this lack of agreement in the Joint Committee lies at the heart of the Government’s explanation for the introduction of Part 5 of the United Kingdom Internal Market Bill, and also its plans to address the issue of tariffs on the movement of goods from Great Britain to Northern Ireland in the forthcoming Finance Bill.

The consent mechanism

31. A key difference between the two iterations of the Protocol was the introduction in October 2019 of a consent mechanism, under which, before the end of the “initial period” of four years, the UK Government will have to seek the Northern Ireland Assembly’s views on extension of the trade aspects of the Protocol (Articles 5–10). If a majority of Members of the Assembly vote in favour of continued application of these aspects of the Protocol, they will be extended for a “subsequent period” of four years. If the Assembly’s decision in addition reflects cross-community support, then they will be extended for a further eight years. If the Assembly withholds its consent, Articles 5–10 will cease to apply to Northern Ireland two years after the initial or subsequent period.²⁹

The status of the Withdrawal Agreement in UK law

32. Whatever the tensions inherent in the Protocol, it is an integral part of the Withdrawal Agreement. It therefore shares in the unique status of that Agreement in UK law.
33. This status is set out in Article 4, which states that the Agreement should have the same effect as in EU Member States, including “direct effect”. Article 4(2) also ensures the primacy of EU law where it has been made applicable under the Agreement (see Box 2). In our report on the revised Withdrawal Agreement, we noted that the effect of Article 4 was that the UK would be required to allow domestic courts to disapply any other domestic legislation which was incompatible or inconsistent with the Agreement.

28 See European Union Committee, *The Protocol on Ireland/Northern Ireland* (9th Report, Session 2019–21, HL Paper 66), Chapter 12

29 For a more detailed analysis of the consent mechanism, see European Union Committee, *The Protocol on Ireland/Northern Ireland* (9th Report, Session 2019–21, HL Paper 66), Chapter 13.

Box 2: The principles of ‘direct effect’ and ‘primacy’

Direct effect

The long-established principle of direct effect, first enshrined by the Court of Justice in the judgment of *Van Gend en Loos* in February 1963, enables individuals immediately to invoke applicable provisions of European Law before their national courts. This principle only applies to European laws that fulfil the relevant criteria set down by the Court across many judgments.

The Court has long argued that EU law not only imposes obligations on the Member States, for example not to charge tariffs on imports, but also introduces rights for individuals, such as the right not to be charged a tariff—it is not necessary for the Member State concerned to adopt the European act concerned into its internal legal system via national legislation for a right to be created.

Individuals may therefore take advantage of these rights and directly invoke them before national courts. In this way the individual plays a central role in the policing and enforcement of the application of EU law.

Primacy

The primacy of European Union law, previously referred to as the supremacy of EU law, is another long-established principle of EU law first set down by the Court of Justice in *Costa v ENEL* in 1964. The principle holds that where there is conflict between European law and the law of a Member State the European law should prevail and the national law set aside.

The principles of direct effect and primacy are mutually supportive and inter-dependent.

34. The Withdrawal Agreement was implemented in UK law by the European Union (Withdrawal Agreement) Act 2020. Among other things, the 2020 Act introduced a new provision (section 7A) into the European Union (Withdrawal) Act 2018, to implement Article 4 of the Withdrawal Agreement. Section 7A, using a formula similar to section 2 of the European Communities Act 1972, provides that all rights under the Withdrawal Agreement are “without further enactment to be given legal effect or used in the United Kingdom” and that the “rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—(a) recognised and available in domestic law, and (b) enforced, allowed and followed accordingly”.
35. Notwithstanding section 7A, the 2020 Act also contains a freestanding provision asserting parliamentary sovereignty (section 38). The Constitution Committee stated that section 38 had “no legal effect”,³⁰ and in our own report on the revised Withdrawal Agreement, published in January, we concluded: “It is not clear what would happen if the UK Parliament were subsequently to repeal [section 7A], although if the UK sought to resile from its obligations under the Agreement, this would probably be a breach of international law.”³¹

30 Constitution Committee, *The European Union (Withdrawal Agreement) Bill* (1st Report, Session 2019–21, HL Paper 5), para 126

31 European Union Committee, *Brexit: the revised Withdrawal Agreement and Political Declaration* (1st Report, Session 2019–21, HL Paper 4), para 44

Good faith

36. Article 5 of the Withdrawal Agreement states that the UK and EU will, “in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement”. It affirms that the parties shall “take all appropriate measures, whether general or particular, 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”.

Safeguards and dispute resolution

37. Article 16 of the Protocol states that, if its application leads to “serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures”. It also states that if such safeguards create an imbalance between the rights and obligations under the Protocol, the other party may take proportionate rebalancing measures. Annex 7 to the Protocol sets out the procedures for such safeguarding and rebalancing measures.
38. This is supplemented by Article 168 of the Withdrawal Agreement, which contains an ‘exclusivity clause’: “For any dispute between the Union and the United Kingdom arising under this Agreement, the Union and the United Kingdom shall only have recourse to the procedures provided for in this Agreement.” Under Article 170 of the Withdrawal Agreement, if a dispute arises in the Joint Committee, and if no mutually agreed solution has been reached within three months after a written notice has been provided to the Joint Committee in accordance with Article 169(1), the EU or the United Kingdom may request the establishment of an arbitration panel. Under Article 174, the arbitration panel must refer issues raising questions of EU law to the Court of Justice of the European Union (CJEU). If the ruling of an arbitration panel is not complied with, then temporary remedies can be granted, including the payment to the complainant of a lump sum or penalty payment. Under Article 178, continued non-compliance or non-payment would entitle the complainant, having notified the other party, to suspend relevant obligations under the Withdrawal Agreement.

CHAPTER 3: THE UNITED KINGDOM INTERNAL MARKET BILL

The objectives of the Bill

39. The United Kingdom Internal Market Bill, according to its long title, is a Bill to “make provision in connection with the internal market for goods and services in the United Kingdom”. As part of this overarching objective it also makes provision “in connection with provisions of the Northern Ireland Protocol relating to trade and state aid”.³²
40. This domestic focus is reflected in the Bill’s use of terminology. It uses the term ‘Northern Ireland Protocol’ throughout, rather than the full title, the ‘Protocol on Ireland/Northern Ireland’. Clause 55 (Interpretation) explains: “‘Northern Ireland Protocol’ means the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement.” This contrasts with the European Union (Withdrawal Agreement) Act 2020, which uses the terms ‘Protocol on Ireland/Northern Ireland’ and ‘Ireland/Northern Ireland Protocol’ interchangeably.³³
41. The following sections analyse Part 5 of the Bill, as introduced in the House of Lords, on the Protocol on Ireland/Northern Ireland.

Clause 42: Northern Ireland’s place in the UK internal market and customs territory

42. Clause 42(1) of the Bill states that an “appropriate authority” (defined as Ministers of the UK and devolved governments, including the Northern Ireland Executive, and any other public authority) must, when “implementing, or otherwise dealing with matters arising out of, or related to, the Northern Ireland Protocol”,³⁴ have “special regard” to the need:
 - to maintain Northern Ireland’s “integral place in the UK’s internal market”,³⁵
 - to respect its place “as part of the customs territory of the UK”,³⁶ and,
 - to facilitate “the free flow of goods between Great Britain and Northern Ireland” with the “aim of streamlining trade” and “maintaining and strengthening the integrity and smooth operation” of the UK’s internal market.³⁷
43. These considerations are consistent with Article 1(2) of the Protocol, which states that the Protocol “respects the essential State functions and territorial integrity of the United Kingdom”, but they make no reference to the balancing objectives set out in Article 1(3) of the Protocol, which are to address the unique circumstances on the island of Ireland (including maintaining the necessary conditions for continued North-South cooperation and avoiding a hard border), and to protect the 1998 Belfast/Good Friday Agreement in all

32 All references are to the Bill as amended in the House of Commons, which was read a first time in the House of Lords on 30 September 2020. See the [United Kingdom Internal Market Bill](#) [HL Bill 135 (2019–21)]

33 See European Union (Withdrawal Agreement) Act 2020, [sections 21–24](#).

34 [United Kingdom Internal Market Bill](#), Clause 42(2)(a)

35 [United Kingdom Internal Market Bill](#), Clause 42(1)(a)

36 [United Kingdom Internal Market Bill](#), Clause 42(1)(b)

37 [United Kingdom Internal Market Bill](#), Clause 42(1)(c)(i) and (ii)

its dimensions. Nor is there any reference to the recitals to the Protocol. In other words, clause 42 is selective, requiring Ministers, in implementing the Protocol, to have regard only to its inward-looking, domestic objectives, not those that relate to the unique circumstances on the island of Ireland.

Clause 43: unfettered access

44. Clause 43 supports “the delivery of the UK Government’s commitment to unfettered access for NI goods moving from Northern Ireland to Great Britain”.³⁸ It does so by preventing any “appropriate authority” (see paragraph 42) from introducing any new checks or processes on goods moving from NI–GB.³⁹ The Bill provides for a number of exceptions to this principle where, for example, these are necessary:
- to facilitate access for qualifying Northern Ireland goods to the internal market in the UK;⁴⁰
 - to give effect to international agreements or arrangements that the UK is, or will be, a party to;⁴¹
 - where goods have been declared for a voluntary customs procedure;⁴²
 - for the purposes of VAT or excise duty;⁴³ or,
 - to deal with a threat to biosecurity in Great Britain.⁴⁴

Clause 44: export declarations

45. Clause 44 is titled “Power to disapply or modify export declarations and other exit procedures”. It gives UK ministers (but not other ministers or public authorities) the power to make provisions about the application of exit procedures to goods moving from NI to GB.⁴⁵ This explicitly includes the power to disapply “any exit procedure that is applicable by virtue of the Northern Ireland Protocol” (clauses 44(2) and (4)). In using this power, Ministers are to take into account the need for unfettered access for Northern Ireland goods to Great Britain, and the need to “maintain the smooth operation of the internal market” in the UK.⁴⁶
46. Clause 44(5) states that any provision made using this power may provide for requirements arising as a result of “any international or domestic law, not to be recognised, available, enforced, allowed or followed”.
47. Any regulations made under clause 44 in the first six months after it comes into force will be subject to “made affirmative procedure”—that is to say, they will come into effect immediately, and only subsequently be subject to affirmative resolution in both Houses.⁴⁷ After the first six months

38 [United Kingdom Internal Market Bill Explanatory Notes](#), para 274

39 [United Kingdom Internal Market Bill](#), Clause 43(1)(a)

40 [United Kingdom Internal Market Bill](#), Clause 43(2)(a)

41 [United Kingdom Internal Market Bill](#), Clause 43(2)(b)

42 [United Kingdom Internal Market Bill](#), Clause 43(2)(c)

43 [United Kingdom Internal Market Bill](#), Clause 43(2)(d)

44 [United Kingdom Internal Market Bill](#), Clause 43(2)(e). In amending the Bill, the House of Commons added clauses clarifying the application of this aspect of the Bill to VAT, biosecurity and disease: Clauses 43 (4), (5) and (6) respectively.

45 [United Kingdom Internal Market Bill](#), Clause 44(1)

46 [United Kingdom Internal Market Bill](#), Clause 44(3)(a) and (b)

47 [United Kingdom Internal Market Bill](#), Clause 44(6)(a)

have passed, regulations made under clause 44 will be subject to normal affirmative resolution.⁴⁸

48. It is clear that the explicit legislative intent behind clause 44 of the Bill is to disapply the obligation imposed by Article 5 of the Protocol (voluntarily assumed by the UK in January) to ensure that the Union Customs Code is applied to Northern Ireland, including (as we anticipated in January 2020) the requirement for exit summary declarations for goods moving from Northern Ireland to Great Britain. Unlike the Protocol, the clause makes no reference to the desirability of avoiding the imposition of customs or other controls at the border between Northern Ireland and Ireland; nor does it refer to Ireland’s obligations as a member of the EU internal market and customs union.

Clauses 45 and 46: State aid

49. Clauses 45 and 46 relate to State aid. Clause 45 introduces a power for the Secretary of State to make provision about how Article 10 of the Protocol (State aid) is to be interpreted for the purposes of domestic law.
50. Regulations under this provision would be able to disapply or modify the effect of Article 10. As the Government’s Explanatory Notes to the Bill acknowledge, subsection (3) then provides examples of the “broad way in which regulations may be used for this purpose”.⁴⁹ These would include, for instance, provision for Article 10 “not to be interpreted in accordance with case law of the European Court”⁵⁰—despite the fact that the essential purpose of Article 10 is to apply provisions of EU State aid law (which fall within the exclusive jurisdiction of the CJEU) to the UK in respect of Northern Ireland.
51. Clause 46 is a statutory requirement that no one apart from the Secretary of State may notify or inform the European Commission of State aid, or proposed State aid, where required under Article 10. The Explanatory Notes to the Bill indicate that:

“This does not prevent others doing so on behalf of the Secretary of State where they are authorised to do so. This reflects the status quo, namely that this function is presently performed by the Foreign Secretary via the UK Mission in Brussels. The Secretary of State will be subject to regulations made under clause 43(1) when interpreting Article 10.”⁵¹

52. The Institute for Government has noted that, taken together, clauses 45–46 would “allow UK Ministers to apply State aid law according to the UK rather than the EU’s interpretation”.⁵²

Clause 47: incompatibility with international or domestic law

53. Put simply, clause 47 of the Bill states that regulations made under clauses 44 and 45 cannot be deemed to be unlawful on the basis of incompatibility

48 [United Kingdom Internal Market Bill](#), Clause 44(6)(b)

49 [United Kingdom Internal Market Bill Explanatory Notes](#), para 283

50 [United Kingdom Internal Market Bill](#), Clause 45(6) makes it clear that the term ‘Article 6’ encompasses “the provisions of EU law listed in Annex 5 to the Northern Ireland Protocol”: in other words, any CJEU case law in respect of these EU laws may be disapplied insofar as they apply in Northern Ireland.

51 [United Kingdom Internal Market Bill Explanatory Notes](#), para 288

52 Institute for Government, ‘What is the UK Internal Market Bill?’, (23 September 2020): <https://www.instituteforgovernment.org.uk/explainers/internal-market-bill> [accessed 7 October 2020]

with international or domestic law. For instance, any regulations made under clause 45 will have effect, regardless of any relevant international or domestic law with which they are incompatible or inconsistent. Thus, if enacted, clause 47 means that the Government could use the delegated powers just described to overturn commitments entered into not just by means of the Protocol, but also by means of the Withdrawal Agreement—regardless of whether or not those commitments have previously been implemented in primary legislation.

54. The clause (originally introduced in the Commons as clause 45, and subsequently amended by the Commons) was subject of immediate commentary by legal academics. Professor Catherine Barnard described it as “a remarkable step for the UK government to take”,⁵³ and Professor Mark Elliott called it “constitutional dynamite”.⁵⁴
55. It follows also that clause 47 is in direct conflict with Article 4 of the Withdrawal Agreement, and with section 7A of the European Union (Withdrawal) Act 2018, which, as we have shown, provide for the primacy and direct effect of any EU law applying by virtue of the Withdrawal Agreement.
56. Professor Elliott also noted that the clause went further, insofar as it conflicts directly with the new section 7A of the European Union (Withdrawal) Act 2018 (see paragraph 53 above), which, in implementing Article 4 of the Withdrawal Agreement, provides for the direct effect and primacy of any EU law applying by virtue of that Agreement. In Professor Elliott’s words, the clause “is flatly inconsistent with this key aspect of the Agreement”. Professor Kenneth Armstrong agreed, commenting that it “drives a coach and horses through the UK’s implementation of the Withdrawal Agreement”.⁵⁵ Their argument is that the presence of these elements of clause 47 alone leads to a potential breach of the provisions of the main text of the Withdrawal Agreement, as well as the Protocol.
57. In more detail, clause 47(1) provides that regulations made under clauses 44(1) and 45(1) “have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent”. To underline the point, the Bill adds at clause 47(2):

“Regulations under section 44(1) or 45(1) are not to be regarded as unlawful on the grounds of any incompatibility or inconsistency with relevant international or domestic law (and section 6(1) of the Human Rights Act 1998 does not apply in relation to the making of regulations under section 44(1) and 45(1).”⁵⁶

53 UK in a Changing Europe, ‘The Internal Market Bill: when is EU law not EU law’, (10 September 2020): <https://ukandeu.ac.uk/the-internal-market-bill-when-is-eu-law-not-eu-law/> [accessed 7 October 2020]

54 Public Law for Everyone, ‘The Internal Market Bill—A Perfect Constitutional Storm’, (9 September 2020): <https://publiclawforeveryone.com/2020/09/09/the-internal-market-bill-a-perfect-constitutional-storm/> [accessed 7 October 2020]

55 UK Constitutional Law Association, Can the UK Breach the Withdrawal Agreement and Get Away With It? (9 September 2020): <https://ukconstitutionallaw.org/2020/09/09/kenneth-armstrong-can-the-uk-breach-the-withdrawal-agreement-and-get-away-with-it-the-united-kingdom-internal-market-bill/> [accessed 7 October 2020]

56 Section 6(1) of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way which is incompatible with a right under the European Convention on Human Rights.

58. “Relevant international and domestic law” is defined exhaustively at clause 47(8). It encompasses:
- (a) any provision of the Northern Ireland Protocol;
 - (b) any other provision of the EU Withdrawal Agreement;
 - (c) any other EU law or international law;
 - (d) any provision of the European Communities Act 1972;
 - (e) any provision of the European Union (Withdrawal) Act 2018;
 - (f) any retained EU law or relevant separation agreement law; and
 - (g) any other legislation, convention or rule of international or domestic law whatsoever, including any order, judgment or decision of the European Court or of any other court or tribunal.

The only aspect of domestic or international law excluded from the scope of clause 47 is Convention rights within the meaning of the Human Rights Act 1998.

59. Clauses 47(2)(b) and 47(7) make the specific changes to the effect of section 7A of the 2018 Act.
60. As initially drafted the provision also appeared to exclude judicial review of regulations made under the Bill in relation to both exit procedures and the State aid provisions, not only on the basis of incompatibility with EU law and the Withdrawal Agreement, but also on the grounds of normal domestic law or, potentially, Human Rights Act grounds.
61. The latest version of the Bill contains a number of new provisions, made by way of Government amendments in the Commons. These include clauses 47(4), 47(5) and 47(6) which, rather than simply ousting the powers of the courts, seek to regulate the circumstances in which a court could entertain “any proceedings for questioning the validity or lawfulness of regulations made under section 44(1) or 45(1)”. Notably, clause 47(6) seeks to circumscribe the jurisdiction and powers of a court or tribunal, making them subject to clause 47(1) and (2). This may affect the remedies which could be granted by the courts. Professor Elliott has observed that while the new amendment could facilitate judicial review, it could leave claimants with a “purely Pyrrhic” victory, if the courts felt they were unable to quash the regulations due to the ‘notwithstanding clause’.⁵⁷
62. In addition, a new clause 47(3) provides that regulations under section 44(1) or 45(1) are to be treated, for the purposes of the Human Rights Act 1998, as if they were within the definition of “primary legislation” in section 2(1) of that Act. This means that while the courts might be able to make a declaration

⁵⁷ Public Law for Everyone, ‘The Internal Market Bill—A Perfect Constitutional Storm’, (9 September 2020): <https://publiclawforeveryone.com/2020/09/09/the-internal-market-bill-a-perfect-constitutional-storm/> [accessed 7 October 2020]

of incompatibility in respect of the secondary legislation, they would not be able to quash it by reason of any incompatibility with a Convention right.⁵⁸

63. All these provisions raise issues in respect of the rule of law. The Constitution Committee⁵⁹ and the Joint Committee on Human Rights (JCHR)⁶⁰ have both published letters to the Government addressing some of these, and will no doubt explore them further in any reports which they make on the Bill.

Clause 56: commencement

64. A further amendment, made to the Bill in the House of Commons, outlines the process whereby clauses 44, 45 and 47 will come into force. For all other clauses in the Bill, the Secretary of State can by regulation simply set a date for their ‘commencement’. But clause 56 provides, among other things, that such an instrument may not set a date for the commencement of clauses 44, 45 and 47 unless a Minister of the Crown has first moved a motion in the House of Commons to the effect that they may be commenced on or after a date specified in the motion, and that the motion has been approved by that House. In other words, the three clauses will remain inoperative until the House of Commons approves a motion allowing them to be activated.
65. A motion would also have to be tabled in the House of Lords, to ‘take note’ of the specified date. Such motions cannot be amended, and given their neutral wording there is “neither advantage nor significance in opposing them”.⁶¹

58 For additional analysis, see: Public Law for Everyone, ‘One step forward, two steps back? Judicial review and the Government’s amendments to the Internal Market Bill’, (September 2020): <https://publiclawforeveryone.com/2020/09/25/one-step-forward-two-steps-back-judicial-review-and-the-governments-amendments-to-the-internal-market-bill/> [accessed 7 October 2020]

59 Letter dated 11 September 2020 from Baroness Taylor of Bolton to Rt Hon Robert Buckland QC MP, Lord Chancellor, on the Rule of Law and the UK Internal Market Bill: <https://committees.parliament.uk/publications/2514/documents/24959/default/> [accessed 3 October 2020]

60 Letter dated 29 September 2020 from Rt Hon Harriet Harman MP to Rt Hon Alok Sharma MP, Secretary of State for Business, Energy & Industrial Strategy, regarding the UK Internal Market Bill: <https://committees.parliament.uk/publications/2771/documents/27677/default/> [accessed 29 September 2020]. See also reply dated 10 October 2020 from Rt Hon Alok Sharma MP to Rt Hon Harriet Harman MP: <https://committees.parliament.uk/publications/2961/documents/28331/default/> [accessed 14 October 2020].

61 See *Companion to the Standing Orders*, paragraph 6.59

CHAPTER 4: THE COMPATIBILITY OF THE UNITED KINGDOM INTERNAL MARKET BILL WITH INTERNATIONAL LAW

The Government's legal argument

66. The United Kingdom Internal Market Bill triggered controversy even before it was published. On 8 September 2020, following media reports that the Government was planning to use the Bill to breach its obligations under the Protocol, the Secretary of State for Northern Ireland, Rt Hon Brandon Lewis MP answered an urgent question in the House of Commons. In his opening answer he stated that the Government was “fully committed to implementing the withdrawal agreement and the Northern Ireland Protocol”. But responding to a supplementary question from Sir Robert Neill MP, he said: “Yes, [the Bill] does break international law in a very specific and limited way. We are taking the power to disapply the EU law concept of direct effect, required by article 4, in certain very tightly defined circumstances.”⁶²
67. Two days later, on 10 September, following publication of the Bill, the Government published its legal position on the legislation.⁶³ The paper acknowledged that what is now clause 47 of the Bill “partly disapplies Article 4 of the Withdrawal Agreement because it removes the possibility of challenge before the domestic courts to enforce the rights and remedies provided for in the Withdrawal Agreement”. The Government accepted the need to discharge treaty obligations in good faith, but argued that “it is important to remember the fundamental principle of Parliamentary sovereignty”. It went on to contend that, as a matter of domestic law, the UK Parliament can pass legislation which is in breach of the UK’s treaty obligations and that Parliament “would not be acting unconstitutionally” in enacting such legislation. The paper claimed that due to the UK’s dualist legal system “treaty obligations only become binding to the extent that they are enshrined in domestic legislation”.
68. This last point is clearly wrong in law. The correct view is that treaties are binding in law on the international plane. In the *Miller* judgment the Supreme Court was clear that the “dualist theory” is based on a clear distinction between international and domestic law:

“International law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state. As Lord Kingsdown expressed it in *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo PCC 22, 75, treaties are ‘governed by other laws than those which municipal courts administer’. The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law.”⁶⁴

62 HC Deb, 8 September 2020, cols 497, 509

63 HM Government, *HMG legal position: UKIM Bill and Northern Ireland Protocol* (September 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916702/UKIM_Legal_Statement.pdf [accessed 7 October 2020]

64 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 55

69. It follows that while the principle of Parliamentary sovereignty allows Parliament to legislate in a manner contrary to international obligations, such legislation is only operational in the domestic sphere.⁶⁵ Thus the safeguards added to the Bill in the Commons (described in paragraph 64), whatever their domestic import, do nothing to prevent or mitigate the breach of the Withdrawal Agreement and the Protocol that is explicitly contemplated in Part 5.
70. This conclusion is reinforced by the terms of the Vienna Convention on the Law of Treaties 1969. Article 26 is entitled *Pacta sunt servanda*.⁶⁶ It states: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” In case this is not clear enough, Article 27 provides: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁶⁷
71. A more nuanced defence of the Government’s position was advanced on 15 September by the then Advocate General for Scotland, Lord Keen of Elie QC, giving evidence to our Security and Justice Sub-Committee. He suggested that the Secretary of State had answered the “wrong question”. He emphasised that he had reached his conclusions on the basis of the “factual matrix as it has been identified by Her Majesty’s Government”—in essence, the facts of the case as reported to him by his client, the Government. This ‘factual matrix’ (which we explore in more detail at paragraph 81 below) suggested that the EU had not been acting in good faith, and was therefore in breach of the Withdrawal Agreement. Lord Keen recalled that Article 16 of the Protocol allows the United Kingdom to take “unilateral safeguard measures” in the event of serious economic, societal or environmental difficulties arising from the operation of the Protocol, but noted that Article 4 of the Withdrawal Agreement, establishing the direct effect and primacy of EU law, would make it “very difficult to take the steps required in the event that Article 16 is triggered”. The provisions in the Bill were therefore necessary, since “at the 11th hour, we might be required to respond to what we regard as a failure of good faith on the part of the EU”. On this basis he believed that the Government was “adhering to the rule of law”.⁶⁸
72. The following day, however, the Secretary of State for Northern Ireland repudiated Lord Keen’s arguments, telling the House of Commons Northern Ireland Affairs Committee: “The Government’s legal advice, as the Attorney General set out, is clear. The comments I made last week reflect that legal advice.”⁶⁹ Lord Keen then resigned, and his resignation letter to the Prime Minister states: “I have endeavoured to identify a respectable argument for

65 The prevailing view of legal commentators has been summarised by the House of Commons Library as follows: “Parliamentary sovereignty does not change the binding nature of the UK’s international obligations. Therefore, international lawyers have said that the UK would still be in breach of the international obligations ... regardless of the internal principle of parliamentary sovereignty which can only apply domestically.” See House of Commons Library, *The United Kingdom Internal Market Bill 2019–21*, [Briefing Paper 9003](#), 14 September 2020

66 Latin, ‘Agreements must be kept’.

67 Vienna Convention on the law of treaties (with annex), Concluded at Vienna on 23 May 1969: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> [accessed 3 October 2020]

68 Oral evidence taken before the EU Security and Justice Sub-Committee, 15 September 2020 (Session 2019–21), [Q 1](#)

69 Oral evidence taken before the Northern Ireland Affairs Committee, 16 September 2020 (Session 2019–21), [Q 3](#)

the provisions at clauses [44 to 47] of the Bill but it is now clear that this will not meet your policy intentions.”⁷⁰

73. In evidence to this Committee on 7 October, the Chancellor of the Duchy of Lancaster, Rt Hon Michael Gove MP, repeatedly emphasised that the Government continued to negotiate in good faith and was seeking agreement through the Joint Committee. He described the Bill as a “safety net”, which would only be invoked if those discussions with the EU did not reach a satisfactory conclusion:

“They are intended to ensure that if there are areas that require to be addressed, as there are, first the Joint Committee should address them. Then, if no agreement can be reached in the Joint Committee, an arbitral process, of course, kicks in. We reserve the right, and the legislation is there, to ensure that the integrity of the United Kingdom is protected if no agreement has been reached.”⁷¹

74. Mr Gove therefore argued that “we have not breached the agreement”, emphasising that “we absolutely do believe in the rule of law”.⁷²
75. Mr Gove’s arguments for the lawfulness of the Government’s actions are thus similar in outline to those advanced by Lord Keen, prior to his resignation. This makes it all the more puzzling that the Government should also have stood by the Secretary of State for Northern Ireland’s statement that the Bill, by disapplying the direct effect of EU law, as required by Article 4 of the Withdrawal Agreement, breaks international law.

The European Commission’s response

76. In a statement published after an emergency meeting of the Withdrawal Agreement Joint Committee on 10 September, Maroš Šefčovič, the EU’s lead representative on the Joint Committee, called on the UK Government to “withdraw these measures from the draft bill in the shortest time possible and in any case by the end of the month”. Mr Šefčovič said that the EU “would not be shy in using” the dispute resolution procedures contained in the Withdrawal Agreement (described at paragraphs 37 and 38).⁷³
77. On 1 October 2020 the European Commission duly initiated infringement proceedings by sending the UK Government a letter of formal notice alleging that it had breached obligations under the Withdrawal Agreement. In launching these proceedings the Commission made use of provisions in the Withdrawal Agreement that enable the Commission, until the end of the transition period (and for four years after the end of transition period for breaches committed before the end of the transition period) to bring infringement proceedings⁷⁴ and refer potential breaches of EU law to the Court of Justice of the European Union (CJEU), as if the UK were still

70 A photograph of the letter was published on Twitter by the editor of HuffPost UK, Paul Waugh: see Paul Waugh (@paulwaugh), tweet on 16 September 2020: <https://twitter.com/paulwaugh/status/1306279957967106049> [accessed 5 October 2020]

71 Oral evidence taken on 7 October 2020 (Session 2019–21), [Q 4](#) (Rt Hon Michael Gove MP)

72 *Ibid.*

73 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 7 October 2020]

74 The arrangements for infringement proceedings are set out in Article 258 of the [Treaty on the Functioning of the European Union](#).

a Member State. These provisions also apply to alleged breaches of the Withdrawal Agreement during the transition period.⁷⁵

78. In an accompanying press release, the Commission highlighted Article 5 of the Withdrawal Agreement, the “good faith” provision, described at paragraph 36 of this report. The President of the European Commission, Ursula von der Leyen, also made a statement reiterating that the tabling of the Bill and the UK Government’s refusal to remove the contentious clauses of the Bill amounted to a breach of the duty of good faith contained in Article 5 of the Withdrawal Agreement.
79. The Commission has given the UK until the end of October to submit its observations in response to the letter of formal notice.⁷⁶ At the end of that period, the Commission has indicated that it may decide, in accordance with the EU’s infringement procedure, to issue a ‘reasoned opinion’. If the UK fails to comply with that opinion, the matter could then be referred to the Court of Justice of the European Union.

Government allegations against the EU

80. The Government has justified the provisions contained in the Bill by claiming that they are necessary to protect the United Kingdom against unreasonable behaviour on the part of the EU. In his speech opening the Second Reading debate on the Bill on 14 September, the Prime Minister stated:

“Some in the EU are now relying on legal defaults to argue that every good is ‘at risk’, and therefore liable for tariffs ... The EU is threatening to carve tariff borders across our own country, to divide our land, to change the basic facts about the economic geography of the United Kingdom and, egregiously, to ride roughshod over its own commitment under article 4 of the Protocol, whereby ‘Northern Ireland is part of the customs territory of the United Kingdom.’”⁷⁷

81. The Prime Minister went further in evidence to the House of Commons Liaison Committee. Asked by the Chair of the Future Relationship with the European Union Committee whether he thought the EU was negotiating in good faith, he replied: “I am afraid, alas, as I have said, I don’t believe they are.” He cited in particular the EU’s failure to address the issue of “third country listing”—that is to say, the process whereby the EU has created an approved list of non-EU countries from which food can be imported into the EU’s Single Market.⁷⁸ The implication, according to the Prime Minister, is that there could be a “potential blockade” on the movement of food and agricultural produce from Great Britain to Northern Ireland (which will be subject to Single Market rules):

75 [Withdrawal Agreement](#) (19 October 2019), Article 131. As noted at para 76 above, the Withdrawal Agreement establishes a dispute settlement process for where the UK and EU disagree over the interpretation or application of the Agreement. However, under Article 185 of the Agreement this process only comes into operation after the end of the transition period. For more on this, see House of Commons Library, *The UK-EU Withdrawal Agreement: dispute settlement and EU powers*, [Briefing Paper 9016](#), 2 October 2020

76 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 7 October 2020]

77 HC Deb, 14 September 2020, [cols 42–43](#)

78 Oral evidence taken before the House of Commons Liaison Committee, 16 September 2020 (Session 2019–21), [QQ 79–80](#) (Rt Hon Boris Johnson MP, the Prime Minister)

“The EU has said that if we fail to reach an agreement to its satisfaction, it might very well refuse to list the UK’s food and agricultural products for sale anywhere in the EU ... that decision would create an instant and automatic prohibition on the transfer of our animal products from Great Britain to Northern Ireland.”⁷⁹

82. Given the justification the Government has advanced for the measures contained in the Bill, it is striking that the Bill does not in fact address the movement of food or other goods from Great Britain to Northern Ireland. It is also notable both that the allegation that the EU was seeking to withhold third country listing from the UK was quickly rejected by the EU’s Chief Negotiator, Michel Barnier,⁸⁰ and that a week after the Prime Minister’s evidence to the Liaison Committee, the Chancellor of the Duchy of Lancaster was able to report to the House of Commons that “progress has been made” on the issue.⁸¹
83. On 17 September, the Government published a statement providing a further explanation of when and how it would activate the so-called ‘notwithstanding clauses’ contained in the Bill (clauses 44, 45 and 47).⁸² It stated that the Government will ask Parliament to support the use of these provisions, and any similar subsequent provisions relating to the movement of goods from Great Britain to Northern Ireland, only when, in its view, the EU is “engaged in a material breach of its duties of good faith or other obligations, and thereby undermining the fundamental purpose of the Northern Ireland Protocol”. It gave various examples of such behaviour, including:
- insistence that GB-NI tariffs be charged on goods in ways unrelated to the real risk of their entering the EU (including circumstances where this leads to a failure to reach agreement in the Joint Committee leading to the application of default provisions on goods moving from GB to NI);
 - insistence on paperwork requirements for goods moving from NI to GB;
 - insistence that the EU’s State aid provisions should apply in GB in circumstances when there is no link or only a trivial one to commercial operations taking place in NI; and
 - refusal to grant third country listing to UK agricultural goods for “manifestly unreasonable or poorly justified reasons”.
84. The statement then added that “in parallel with the use of these provisions [the Government] would always activate appropriate formal dispute settlement mechanisms with the aim of finding a solution through this route”.
85. In his evidence to us on 7 October, Mr Gove did not in terms repeat the Prime Minister’s statement that the EU had not been acting in good faith, stating that “while negotiations are proceeding ... I would not want to

79 HC Deb, 14 September 2020, cols 42–43

80 Michel Barnier (@MichelBarnier), tweet on 13 September 2020: <https://twitter.com/MichelBarnier/status/1305078030331793408> [accessed 10 October 2020]

81 HC Deb, 23 September 2020, col 976

82 Prime Minister’s Office, 10 Downing Street, 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 7 October 2020]

pronounce definitely on that question”. He suggested that “a fair minded third party might consider that the EU had not been negotiating in quite the way we would have wanted”. However, since the Prime Minister’s comments were made, there had been “clear signs” that “talks have been proceeding in a constructive way. ... Michel Barnier has subsequently indicated that there will not be a problem with third-country listing”. Mr Gove also hinted at constructive discussions in relation to exit summary declarations and goods at risk. He said that the Government would have to “wait and see what happens in the negotiations” before considering the implications for amendments to Part 5 of the Bill, and that it would “if necessary” bring forward provisions on the movement of goods from Great Britain to Northern Ireland in the forthcoming Finance Bill, which he said would come before Parliament before the end of the year.⁸³

The European Union Committee’s letter of 18 September 2020

86. We discussed the Bill at our meeting on 15 September, and decided to publish a report on the Bill before its second reading in the House of Lords. At the same time, we agreed to give the Government an opportunity to explain the reasoning behind the Bill and to provide any evidence to support the allegations being made against the EU.
87. On 18 September we therefore wrote to the Chancellor of the Duchy of Lancaster, Rt Hon Michael Gove MP, with nine questions, covering matters of both fact and law. In that letter, which is reproduced in full in Appendix 2, we asked whether the Government remained of the view that the Bill broke international law, and if so how. We asked for more information on the Government’s concerns about the EU’s interpretation of the Protocol, and on the steps it had taken to address these concerns through the institutions and processes set up under the Withdrawal Agreement. We asked the Government to provide any evidence in its possession to support the allegation that the EU had not acted in good faith, or that it had stated its willingness to ‘blockade’ Northern Ireland.⁸⁴
88. We requested an answer to reach us by 25 September, to assist in the preparation of this report. At the time the report was agreed (13 October 2020) no answer had been received.

83 Oral evidence taken on 7 October 2020 (Session 2019–21), [QQ 4–7, 17](#) (Rt Hon Michael Gove MP)

84 Letter dated 18 September 2020 from Lord Kinnoull, Chair of the European Union Committee, to the Chancellor of the Duchy of Lancaster, Rt Hon Michael Gove MP: <https://committees.parliament.uk/publications/2646/documents/26302/default/> [accessed 7 October 2020]

CHAPTER 5: CONCLUSIONS

89. **The tensions inherent in the Protocol on Ireland/Northern Ireland were not hidden—they were apparent from the outset. The Protocol was then ratified by both the UK and the EU in full knowledge of these tensions.**
90. **The expectation must therefore have been that the two sides would, in good faith, negotiate a pragmatic compromise, providing proportionate safeguards to both sides, and meeting the objectives set out in the Recitals and in Article 1 of the Protocol, namely respecting the essential State functions and territorial integrity of the UK, addressing the unique circumstances on the island of Ireland, and protecting the 1998 Belfast/Good Friday Agreement in all its dimensions.**
91. **If the Government judges that the EU is not complying with the Protocol, or is not seeking to implement it in good faith, it will be fully entitled to invoke the arbitration and dispute resolution procedures set out in the Withdrawal Agreement. These procedures could ultimately result in the United Kingdom being authorised unilaterally to suspend relevant obligations under the Protocol.**
92. **Furthermore, if the application of the Protocol at any point gives rise to serious and persistent economic, societal or environmental difficulties, the United Kingdom will be entitled unilaterally to take appropriate safeguard measures under Article 16 of the Protocol.**
93. **We note also that the trade aspects of the Protocol are subject to a periodic consent mechanism. Should they no longer be acceptable to the people of Northern Ireland, there will be a democratic process by which they can be terminated.**
94. **In summary, the Withdrawal Agreement and the Protocol contain elaborate and multi-layered safeguards. The Government has offered no convincing explanation of why, rather than making use of these safeguards, it has chosen to address its concerns over the implementation of the Protocol by means of the United Kingdom Internal Market Bill.**
95. **The Bill itself would confer upon Ministers powers to make regulations that would breach an international agreement that the UK ratified as recently as January 2020. Indeed, clause 45 gives numerous examples of how such powers could be used. The Bill also confers upon Ministers the power to override provisions contained in the European Union (Withdrawal Agreement) Act 2020, which was enacted in order to give effect to that agreement.**
96. **On 8 September 2020 the Secretary of State for Northern Ireland told the House of Commons that the Bill “break[s] international law in a very specific and limited way”. But in the days following this clear statement there was considerable confusion over the Government’s legal position. The former Advocate General, Rt Hon Lord Keen of Elie QC, argued that the Bill was in fact necessary and lawful, to enable the United Kingdom to take unilateral action, as envisaged in Article 16 of the Protocol, in the event of the EU failing to act in**

good faith in implementing the Protocol. The Secretary of State has since stood by his original statement, although the Chancellor of the Duchy of Lancaster, in evidence to this Committee, appeared to echo elements of Lord Keen's argument.

97. It follows that until the Government formally retracts the Secretary of State's statement of 8 September 2020 and puts forward a coherent and consistent argument to support the lawfulness of the Bill, it is difficult to avoid the conclusion that Part 5 of the Bill does indeed contravene international law.
98. It is also clear from the Secretary of State's statement, and his insistence that in making that statement he was acting on legal advice, that this breach of international law has been entered into knowingly. Indeed, the Bill strikes at the heart not only of the Protocol, but of the Withdrawal Agreement, in particular Article 4, which provides for the direct effect of the terms of the Agreement, and which was implemented in January 2020, by means of new section 7A of the European Union (Withdrawal) Act 2018.
99. We note also that the objectives set out in the Bill, which relate wholly to the UK internal market, reflect the commitment in Article 1(2) of the Protocol to respect the essential State functions and territorial integrity of the UK. But they fail to give effect to the balancing commitment in Article 1(3) to address the unique circumstances on the island of Ireland (including maintaining North-South cooperation and avoiding a hard border), and to protect the Belfast/Good Friday Agreement in all its dimensions. This is not to say that Ministers would ignore such considerations when exercising the powers conferred upon them under the Bill—but they would not be required to have regard to them.
100. We acknowledge both the Government's continuing commitment to the Belfast/Good Friday Agreement, and its legitimate concern that a rigid interpretation of the Protocol, by creating barriers between Northern Ireland and Great Britain, could undermine it. Yet the Belfast/Good Friday Agreement is itself made up of three interlocking strands, supporting North-South, East-West and internal Northern Ireland relationships. All parties to the Agreement, including the United Kingdom Government and the European Union, have an obligation to maintain this delicate balance.
101. By focusing solely on Northern Ireland's relationship with the rest of the UK, the Bill fails to reflect that balance, and we therefore consider that in principle, if not in intent, it could pose a threat not just to the Withdrawal Agreement (including the Protocol on Ireland/Northern Ireland), but to the maintenance of the Belfast/Good Friday Agreement.
102. As for the wider political context, at the time the Bill was introduced the Government alleged that the EU had not been acting in good faith, and in particular, that it had, by withholding third country listing for the United Kingdom, been threatening to prevent the transport of food from Great Britain to Northern Ireland. The Government has not answered our letter of 18 September, and it has not disclosed

any evidence to support this allegation, which, if true, would constitute a grave and extraordinary breach by the European Union of the Withdrawal Agreement. Nor is it obvious how, in practice, the European Union could stop the movement of goods between Great Britain and Northern Ireland. Nevertheless, we welcome the Government's confirmation on 23 September 2020 that progress has been made on the question of third country listing.

103. It is notable, though, that the Bill itself does not address the substance of the allegation made by the Government. It says nothing of the definition of goods not at risk of entering the EU Single Market, nor of tariffs or other charges that might be imposed on goods moving from Great Britain to Northern Ireland. There is a mismatch between the Government's justification for introducing the Bill, and what the Bill actually does.
104. The Government has now published a statement saying that it would not seek to use the powers contained in the Bill unless the European Union were itself to be demonstrably acting in bad faith, and that it would in parallel use the dispute resolution procedures contained in the Agreement. This statement is reflected in the Government amendments agreed by the House of Commons, including new clause 56, which provides that a further resolution of the House of Commons will be required before a Minister can use the powers contained in Part 5. The clause provides no equivalent role for the House of Lords.
105. But the addition of this further domestic safeguard does not alter the Bill's fundamental incompatibility with the Withdrawal Agreement. Nor does it alter the fact that rather than using the dispute resolution procedures set out in the Agreement, and retaining the option of emergency legislation as a potential last resort, the Government sought pre-emptively to use domestic legislation to overturn commitments entered into in the international sphere. On 1 October the European Commission duly launched infringement procedures which, in accordance with the terms of the Withdrawal Agreement, will fall to be decided by the Court of Justice of the European Union.
106. Whatever the substance of the disagreements that have arisen in the future relationship negotiations and in the Joint Committee, the Government's pre-emptive action has, in effect, placed the United Kingdom in the wrong. In the process it has damaged the United Kingdom's international reputation as a defender of the rule of law.
107. In summary, the Government has not disclosed any evidence that the EU has acted in bad faith; it has not explained why, if the EU has acted in bad faith, the Government chose not to use the safeguard, arbitration and dispute resolution procedures contained in the Withdrawal Agreement and the Protocol; and it has not explained why it chose instead, by publishing Part 5 of the Bill when it did, to take pre-emptive and unilateral action. In the absence of these explanations, we hope that the Government will, when the Bill is read a second time, indicate a change of heart, and undertake to table amendments to remove Part 5, while giving renewed and more urgent focus to the task of reaching an agreement with the EU both on the future UK-EU relationship, and on the implementation of the Protocol.

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members of the European Union Select Committee

The Earl of Kinnoull (Chair)
 Baroness Brown of Cambridge
 Lord Cavendish of Furness
 Baroness Couttie
 Baroness Donaghy
 Lord Faulkner of Worcester
 Lord Goldsmith
 Baroness Hamwee
 Lord Kerr of Kinlochard
 Lord Lamont of Lerwick
 Baroness Neville-Rolfe
 Lord Oates
 Baroness Primarolo
 Lord Ricketts
 Lord Sharkey
 Lord Teverson
 Lord Thomas of Cwmgiedd
 Baroness Verma
 Lord Wood of Anfield

Declarations of interest

The Earl of Kinnoull (Chair)
Farming interests as principal and as charitable trustee, in receipt of agricultural subsidy
Chairman, Culture Perth and Kinross, in receipt of governmental subsidy
Chairman, United Kingdom Squirrel Accord, in receipt of governmental monies
Shareholdings as set out in the register

Baroness Brown of Cambridge
Vice Chair of the Committee on Climate Change
Chair of the Adaptation Sub-Committee of the Committee on Climate Change
Chair of the Henry Royce Institute for Advanced Materials
Chair of STEM Learning Ltd
Non-Executive Director of the Offshore Renewable Energy Catapult
Chair of The Carbon Trust
Council member of Innovate UK

Lord Cavendish of Furness
Director, Burlington Slate Limited
Shareholder, Holker Holdings Limited
Shareholder, Cartmel Steeplechases (Holker) Limited
Shareholder, Holker Estates Co Limited
Shareholder, Holker Homes Limited
Shareholder, Burlington Slate Limited
Roose and Walney Sand and Gravel Company Limited (The) (Dormant)
Holker Estates Co Limited

Holker Holdings Limited

Cartmel Steeplechases (Holker) Limited

Corrie and Co Limited

Guides over the Kent and Levens Sands Limited

Beneficiary of a Family Trust which owns land in South Cumbria, including residential and business property

Owner of a flat in London SW1 from which rental income is received

Owner of woodlands based in South Cumbria

Baroness Couttie

Non-Executive Director, Mitie

Commissioner, Guernsey Financial Services Commission

Special Advisor, Heyman AI Ltd

Baroness Donaghy

Former President of the Trades Union Congress

Former member European Trades Union Congress

Lord Faulkner of Worcester

Chairman, Great Western Railway Advisory Board

Chairman, Alderney Gambling Control Commission

Her Majesty's Government's Trade Envoy to Taiwan

Lord Goldsmith

Partner of Debevoise & Plimpton LLP international law firm with offices in the UK and various EU cities amongst others

Baroness Hamwee

No relevant interests to declare

Lord Kerr of Kinlochard

Chairman, Centre for European Reform

Deputy Chairman, Scottish Power PLC

Member, Scottish Government's Advisory Standing Council on Europe

Lord Lamont of Lerwick

Director, Jupiter European Opportunities Trust

Director, Compagnie Internationale de Participations Bancaires et Financieres (CIPAF)

Director, Chelverton UK Dividend Trust

Adviser, Halkin Investments

Adviser, Official Monetary and Financial Institutions Forum (OMFIF)

Adviser, Meinhardt Engineering Group, Singapore

Adviser, Stanhope Capital LLP

Baroness Neville-Rolfe

Former Commercial Secretary, HM Treasury

Chair, Assured Food Standards Ltd

Chair, UK ASEAN Business Council

Non-Executive Director, Capita Plc

Non-Executive Director, Secure Trust Bank

Shareholdings as set out in the register

Trustee (Non-Executive Director), Thomson Reuters Founders Share Company

Lord Oates

Director, Centre for Countering Digital Hate

Chairman, Advisory Board, Weber Shandwick

Director, H&O Communications Ltd.

Baroness Primarolo

Non-executive director and chair, Thompson's Solicitors

Lord Ricketts

Non-Executive Director, Group Engie, France

Strategic Adviser, Lockheed Martin UK

Charitable activities as set out in the Register of Interests

Lord Sharkey

No relevant interests declared

Lord Teverson

Trustee, Regen SW

In receipt of a pension from the European Parliament

Lord Thomas of Cwmgiedd

Chairman, London Financial Markets Law Committee

First Vice-President, European Law Institute

Member, First Minister of Wales' European Advisory Group

Baroness Verma

No relevant interests declared

Lord Wood of Anfield

Chair of the United Nations Association (UNA-UK)

Director, Good Law Project

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-financial-interests/house-of-lords-commissioner-for-standards-/register-of-lords-interests/>

APPENDIX 2: LETTER DATED 18 SEPTEMBER 2020 FROM LORD KINNOULL, CHAIR OF THE EUROPEAN UNION COMMITTEE, TO RT HON MICHAEL GOVE MP, CHANCELLOR OF THE DUCHY OF LANCASTER

On Tuesday 15 September the European Union Select Committee had a preliminary discussion of Part 5 of the United Kingdom Internal Market Bill. The provisions of the Bill raise various issues falling within our remit, particularly their inter-relationship with the terms of the UK-EU Withdrawal Agreement and the Protocol on Ireland/Northern Ireland, both of which we have examined in detail in published reports. We therefore plan to publish a report on the Bill in advance of the House of Lords second reading debate.

Before we finalise that report we would like to give the Government the opportunity to set out its views on a number of questions that have arisen with regard to the Bill. We would be grateful to receive your answers in writing no later than Friday 25 September, so that we can reflect them in our draft report.

Our questions are as follows:

1. Does it remain the Government's view that the Bill "does break international law in a very specific and limited way"? If so, in what ways does it do so?
2. What are the Government's principal concerns as regards the EU's interpretation of the Protocol? What are the Government's specific concerns in relation to a) the definition of goods at risk, b) the requirement for exit summary declarations, and c) the implications of Article 10 for UK State aid policy?
3. In addressing these concerns, what consideration has the Government given to the relevance and effect of a) Article 5 of the Withdrawal Agreement, b) the recitals of the Protocol on Ireland/Northern Ireland and c) Article 16 of that Protocol?
4. What discussion of the Government's concerns has taken place in the Withdrawal Agreement Joint Committee and the Ireland/Northern Ireland Specialised Committee? What are the current UK and EU positions on these matters, and how do you propose to reconcile any differences?
5. In view of the Prime Minister's stated intention to resolve these issues through the Joint Committee structure, what further discussions through that structure are planned?
6. During Second Reading of the Bill in the House of Commons on 14 September, the Prime Minister stated that the EU had indicated its willingness to "go to extreme and unreasonable lengths", including "refusing to list the UK's food and agricultural products for sale anywhere in the EU", leading to "an instant and automatic prohibition on the transfer of our animal products from Great Britain to Northern Ireland", thereby "holding out the possibility of blockading food and agricultural transports within our own country." When did the Government first become aware of the EU's intentions? Could you provide evidence to support this claim?
7. Given the Prime Minister's concerns over a potential blockade, why doesn't the Bill address the issue of goods at risk? When and how will it be addressed?

8. The Prime Minister has told the Commons Liaison Committee that he does not believe that the EU has acted in good faith. Can you provide the evidence on which this belief is based?
9. Given the Prime Minister's belief that the EU has acted unreasonably, why has the Government introduced domestic legislation, rather than invoking the formal arbitration and dispute resolution mechanisms set out in the Withdrawal Agreement?

We would be grateful for a response to these questions by Friday 25 September 2020.