The Internal Market Bill: through the looking glass

We live in extraordinary times. But the decision of the government to ask Parliament to give it express powers to breach an international law agreement that that same government entered into (and not only described as a triumph but secured its endorsement in a general election) is still a shocking turn of events.

Clauses 42 to 45 of the Internal Market Bill clearly intend to contravene the Protocol in two ways. First, clause 42 allows ministers to make regulations as to the movement of goods from Northern Ireland to Great Britain that displace the position under the Protocol that the Union Customs Code applies to such movements (requiring export declarations). Second, clause 43 allows ministers wholly to redraft or modify the state aid provision in article 10, such regulations allow the government, like Humpty Dumpty, to define any part of article 10 as meaning just what the government chooses it to mean. Those powers include the right to remove rights to damages and other relief that would otherwise exist under that article.

Consequences, consequences...

Assuming the clauses are passed, what are the legal consequences? Since article 5 of the WA requires the parties to refrain from ‘measures’ that jeopardise the objectives of the WA, it is likely that the government has put the UK in breach of the WA merely by placing the clauses before Parliament – a point worth remembering when you read some of the sophistical arguments being advanced to explain why ministers have not breached the ministerial code. The EU will certainly invoke the various complex forms of dispute resolution mechanisms available to it under the WA. Any final agreement will require the clauses to be withdrawn: and if there is no final agreement, the EU may also respond by refusing to implement various facilitating measures that would allow UK businesses to continue to operate in the EU.

In domestic law, the huge issue will be the effect of the ouster clause. Right back to *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, the courts have objected to, and cut down, ouster clauses as inconsistent with the rule of law and the ability of the courts to scrutinise the lawfulness of acts of the executive. One point particularly worth noting is that the Bill is certified to be compatible with the European Convention on Human Rights (and the ECHR is not included as ‘relevant international law’ for the purposes of the ouster clause). That provides room for an argument that the ouster clause does not oust review under the Human Rights Act and that regulations that removed the right to damages under article 10 should be struck down as incompatible with article 1 of protocol 1 to the ECHR as removing the right to property in a way that (because it breaches the WA) is not in accordance with the law. In any event, it is almost certain that the matter would end up in the Supreme Court.

Whether or not the current government intended to set up another encounter with the courts, that is very likely to be what it gets, if these clauses are passed.