A Test for Sovereignty after Brexit

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As EU and UK negotiators meet in London at the start of the next and crucial round of negotiations on an EU-UK trade deal, the British newspaper *The Telegraph* – under the startling headline *Brexit Deal Never Made Sense, Boris Johnson to Tell EU* – announced that the Withdrawal Agreement already concluded with the EU was considered by the Johnson government to be 'legally ambiguous'. The voice of the Eurosceptic wing of Boris Johnson's Conservative Party, the European Research Group, has suggested that the Withdrawal Agreement be scrapped entirely in the event that a trade deal with the EU is not forthcoming. With influential members of the Prime Minister's own party reminding him that the European Union (Withdrawal Agreement) Act 2020 – which gives legal effect to the Withdrawal Agreement – contains a provision asserting the sovereignty of Parliament, a sentiment appears to be growing that the UK can somehow rewrite or change the Withdrawal Agreement through domestic legislation.

As a sign of growing concern in the EU, the European Commission President Ursula von der Leyen took to Twitter to state:

> I trust the British government to implement the Withdrawal Agreement, an obligation under international law & prerequisite for any future partnership. Protocol on Ireland/Northern Ireland is essential to protect peace and stability on the island & integrity of the single market.

What has brought the issue to the fore is the publication later this week of the so-called UK Internal Market Bill. The Bill was always going to be controversial. After all, it has enormous repercussions for the exercise of devolved power within the UK. But what has, instead, attracted headlines – and precipitated the resignation of the head of the Government Legal Department, Jonathan Jones – is whether aspects of the Bill are incompatible with the Withdrawal Agreement agreed between the EU and the UK.

Speaking in the House of Commons on the eve of the publication of the Internal Market Bill and in response to an urgent question, the Secretary of State for Northern Ireland Brandon Lewis stated that

> 'Yes, this 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 a certain, very tiny, defined circumstances.'

The focus of the analysis here is not on whether there is a substantive incompatibility between the commitments made in the Protocol and the provisions of the Bill for unfettered market access between Northern Ireland and the rest of the UK. That is a matter for discussion within the Joint Committee established under the Withdrawal

Agreement. Rather the issue is whether the UK can, by domestic legislation, limit the direct effect of the Agreement.

Article 4 of the Withdrawal Agreement states:

> 1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.
>
> Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
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> 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.

Albeit a treaty distinct from the treaties establishing the European Union and to which direct effect has been attributed since the early 1960s, the intention behind Article 4, paragraph 1 is that this legal instrument shall be capable of direct enforcement before national courts. As the second paragraph makes clear, the United Kingdom agreed to legislate through domestic primary law for compliance with paragraph 1. But it also clarifies that the consequence of this domestic enforcement is that UK courts are also to be empowered to disapply domestic provisions that are inconsistent or incompatible with the Agreement.

The European Union (Withdrawal Agreement) Act 2020 received Royal Assent on 23 January 2020. In a rather inelegant way, the 2020 Act implements the Withdrawal Agreement by making amendments to the European Union (Withdrawal) Act 2018. Accordingly, the provision that provides for the general implementation of the Agreement is contained in Section 7A of the 2018 Act as amended.

Section 7A replicates the formulation used in the European Communities Act 1972 (which gave domestic legal effect to EU law during membership), such that directly effective provisions of the Withdrawal Agreement are available and enforceable by virtue of the Act and without further enactment. Importantly – and again using the same sort of legal device to secure the primacy of EU law during EU membership – section 7A(3) provides that every enactment (including an enactment contained in the Act) is to interpreted having regard to the need to give effect to and enforce directly effective provisions. This device is intended to safeguard against any implied repeal through contradictory legislation but leaves open express repeal by later statute.

One other provision requires attention. Section 38 of the European Union (Withdrawal Agreement) Act 2020 asserts the sovereignty of the Parliament of the UK. In particular, section 38(2)(b) asserts the sovereignty of Parliament notwithstanding section 7A.

All of which brings us to the crux of the legal issue. Does the sovereignty provision in section 38 allow the UK Parliament to pass legislation which would limit the direct effect and enforcement of the Withdrawal Agreement (and its integral Protocol on Ireland/Northern Ireland), or would such legislation be disapplied by a UK court pursuant to section 7A in implementation of Article 4 of the Withdrawal Agreement?

There is a circularity to the design of the 2018 Act (as amended). Section 7A clearly intends that provisions of the Withdrawal Agreement are to be enforceable before UK courts. Once created by the Act, that effect is not dependent on further enactments by the UK Parliament. Moreover, section 7A(3) clearly intends that future enactments – and that would include a UK Internal Market Bill – are to be interpreted consistent with the duty to give domestic legal effect to the Withdrawal Agreement. And yet, that intention is qualified by an assertion of the sovereignty of the UK Parliament in section 38.

Two lines of argument present themselves.

The first would be to argue that the assertion of sovereignty is too general to permit legislation that is contrary to the Withdrawal Agreement. Article 4 clearly envisages the possibility that UK courts would have to disapply inconsistent domestic provision, for which outcome the UK agreed to legislate. This is what section 7A achieves and what Parliament intends. A general assertation of sovereignty in section 38 does not produce a specific normative claim capable of trumping the clear and precise obligations contained in the Withdrawal Agreement. It would, therefore, remain the duty of the UK courts to disapply inconsistent provisions of a UK Internal Market Act.

The alternative argument would be that to be protected by section 38, the UK Internal Market legislation would need to be express in its intention to legislate contrary to section 7A. A more subtle formulation would risk section 7A(3) being deployed to interpret away any incompatibility. But the more express the alteration of the direct effect and enforcement of the Withdrawal Agreement, the more obvious might become its incompatibility with the Agreement, triggering dispute resolution through the Joint Committee.

The reconciliation of the sovereignty of Parliament with compliance with international obligations was always an open question during the UK's EU membership. Litigation posed, and sometimes, indirectly sought to answer, how that tension might be reconciled, spawning significant academic deliberation. It would be ironic if we found our answer in the post-membership context of Brexit.
