HOUSE OF COMMONS
LONDON SW1A 0AA

15 July 2018

Dear Colleague,

I am writing to clarify the issues of law that affect the proposal contained in the White Paper for a "common rule book" relating to trade in goods between the EU and the United Kingdom.

The current framework

EU law is developed by the EU institutions and becomes binding on Member States by virtue of rules in the EU treaties. Currently, EU laws take effect in the UK in a number of ways. This can be by direct effect, where (by virtue of the European Communities Act 1972) EU laws are "self-executing" and automatically become applicable in the UK, creating rights and duties between our citizens and between citizens and the state without the need for our Parliament to pass any further implementing legislation or, where the EU rules set general goals, they must be transposed into domestic legislation. At present, the CJEU can hear preliminary references from UK courts or tribunals (not the executive) on the interpretation of EU law. Cases can also be brought against the UK by the Commission or other Member States for infringements of EU law.

The proposed framework

The framework outlined in the White Paper would be fundamentally different from the current framework in that the UK's adherence to the "common rule book" would be achieved by a normal international agreement, which would impose a standard *international law* obligation on the UK Government to ensure observance of its terms. **This is completely different to membership of the European Union. We will be taking back control of our laws**.

The provisions of that treaty and the common rules to which they related could not become law *in the UK*, other than by an enactment or other legislative measure of the UK parliament or government. The agreement would not require the UK to give EU legislation direct effect in its national law, so that rules made by the law-making institutions of the EU would no longer have automatic effect in UK law. Thus, the power of the EU institutions to make laws for the United Kingdom will cease.

The suggestion made by some that, under this this agreement, "it is inevitable that the application of the rules in the UK and UK regulatory bodies would continue to be bound by the decisions of EU bodies in the same way as if the UK were still a member state"[1], is, therefore, inaccurate.

The UK would be bound, as it is bound by *any* international treaty to which it continues to adhere. But the agreement would not require it to give direct self-executing effect to EU legislation in its own law as it does now.

In other words, the EU Treaties would no longer bind the UK, and so the direct effect and supremacy of EU law as we have known it would end. In the future, it would be for the UK to legislate for the common rulebook, within our own sovereign legal order.

[1] See e.g. Martin Howe QC: The Chequers Conclusion. A Memorandum by Martin Howe QC at §2.

Moreover, where before UK courts could and sometimes had to make preliminary references to the CJEU, they would no longer be able to do so – bringing **an end to the jurisdiction of the CJEU in the UK.** Rights flowing from the future relationship would be enforced in the UK by UK courts, and the CJEU could no longer have any role in those UK proceedings. Our courts would pay due regard to the case law of the CJEU to ensure consistent interpretation and application of the common rulebook, but they will not be bound to refer matters of principle to the CJEU as before. Nor will the CJEU be able to decide infraction cases against the UK in cases brought by the European Commission.

Finally, it is important to remember that the principles underpinning EU legislation on goods have not significantly changed in the last 30 years.

The referral mechanism

Under the proposal set out in the White Paper, in order to ensure the relevant parts of the future relationship function effectively, detailed discussions with UK and EU officials would first take place in the Joint Committee and any relevant sub-committees as appropriate. Part of the purpose of this dialogue would be to resolve potential disputes between the UK and the EU. Individuals would not be able to bring actions. If a dispute did arise, the Joint Committee, in which the UK would be represented, would seek to facilitate a resolution. If after a period of time negotiations were unsuccessful, in many areas either party would have the option of referring the matter to an independent arbitration panel.

If a question of the interpretation of EU law arose, the Joint Committee would have the option of referring the question to the CJEU – but could only do so *by mutual consent*. This option would also be open to the independent arbitration panel. In the event of a referral, the CJEU would rule on the question of EU law, but it would be for the Joint Committee or arbitration panel to resolve the dispute.

As the White Paper states, this would accommodate the fact that only the CJEU can bind the EU on the interpretation of EU law, while respecting the principle that the court of one party cannot decide disputes between the two.

Consequences of divergence

If the UK diverged from the "common rule book", in a manner permitted by the agreement, the White Paper sets out that there could be proportionate implications for the operation of the future relationship. It is important to note that, under international law, there is a principle of *proportionality*, which entails the obligation not to impose disproportionate measures for the divergence – and our proposal is to embed this principle in our future relationship with the EU. That would mean that, if it were in the UK's national interest, we could choose to diverge from the rule book and incur proportionate consequences.

Conclusion

Crucially, under the plans set out in the White Paper, *the EU will no longer be able to make law in the United Kingdom*. Of course, having agreed a treaty with the EU, we would adhere to it, but our relationship with the EU will be fundamentally different and will be based on the same general international law obligations that we have under many other treaties.

In *Bulmer v Bulmer* [1974] Ch. 401, Lord Denning famously described EEC law as a tide that "flows into the estuaries and up the rivers" of the legal jurisdiction of the UK.

He added, "it cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute". But that flow will now be halted. The EU institutions, including the CJEU, will no longer have the power to make laws for the United Kingdom: the principles of direct effect and of the supremacy of EU law will no longer apply.

The only institutions that will have that power will be the sovereign parliament and the courts of the United Kingdom.

I hope that colleagues will find this clarification helpful and if colleagues would find it useful, I will be available in my office (room 407, Portcullis House) from 1630-1730 on Monday 16th and will be happy to discuss this further. My office can give more details: privateoffice@attorneygeneral.gov.uk.