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Trade, Labor and EU Law Perspectives

Labour Law and the Brexit Withdrawal Agreement

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While the eventual outcome of the UK's withdrawal from the EU remains uncertain, the text of the Withdrawal Agreement (WA) offers some insight into the likely approach of the EU to labour standards in any future EU-UK relationship. The WA was accompanied by a Political Declaration on the Future Relationship. In relation to social and employment standards, this states that the future relationship should build upon the 'level playing field arrangements' provided in the WA (para. 79). Therefore, the WA is an important signal for future negotiations.

In the main body of the WA, labour law issues arise principally in the context of the rights of EU citizens and UK citizens that reside and work in the UK and the EU respectively after Brexit.[1] In particular, Article 24 WA extends the rights that are currently found in Article 45 TFEU and Regulation 492/2011 to those who fall within the personal scope of the WA. For example, this includes the right to equal treatment in employment conditions and the right to exercise collective rights. The beneficiaries of these rights are primarily those who had already exercised their right to reside in the UK and EU before the end of any transition period and who continue to reside thereafter, as well as their family members under certain conditions (Art 10 WA). In essence, these provisions address the legacy situation of those who had already exercised free movement rights prior to Brexit (and any subsequent transition period).

Looking to the future, the most significant labour provisions are found in the Protocol on Ireland / Northern Ireland, better known as the 'Backstop'. The WA provides for a transition period to the end of 2020, which may be further extended for one or two years. In the absence of any new agreement, the Protocol will then come into effect. It is not intended to be permanent (Art 1(4) Protocol), but it is not time-limited. In its final form, the whole of the UK remains part of a 'single customs territory' with the EU (Art 6 Protocol). Given that this provides the UK with tariff-free access to the EU internal market, Annex 4 of the Protocol includes a set of provisions that seek to ensure a 'level playing field'.

Part 3 of Annex 4 addresses 'labour and social standards'. First, it commits the EU and the UK to the principle of non-regression below the common standards applicable at the end of the transition period. Second, the EU and the UK commit to implement effectively those ILO Conventions and

provisions of the European Social Charter (ESC) that the UK and the EU Member States have ratified and accepted. Third, there has to be effective enforcement of labour and social standards. For the EU, this is through the existing mechanisms of Union law, but in relation to the UK it requires: (i) an effective system of labour inspections; (ii) effective administrative and judicial proceedings; (iii) effective remedies.

Naturally, the question arises as to what happens if, for example, the UK changes its labour legislation in breach of the principle of non-regression, or fails to implement effectively ILO and ESC standards. There is a mechanism of binding arbitration panels within Title III WA, which includes the power to impose penalties in case of breach of the WA. This mechanism is not, however, applicable to the provisions on labour and social standards found in the Protocol. The Protocol permits unilateral measures by the EU or the UK in response to 'serious economic, societal or environmental difficulties' arising from its application (Art 18), but this seems to be a last resort mechanism where there is a serious breakdown in relations between the parties. In principle, the provisions of the WA may have direct effect and be relied upon by individuals before domestic courts (Art 4(1) WA). It remains to be seen, though, whether the labour and social standards are sufficiently clear and precise to permit direct effect. This might be a persuasive argument in relation to the obligation on the UK to ensure 'effective remedies', which echoes existing provisions of EU law.

The WA was not intended to provide detailed regulation of labour standards. It was only the shift towards a UK-wide customs arrangement with the EU in the Backstop that led to the inclusion of the brief provisions on labour standards. Nevertheless, if the future relationship is designed to build upon these provisions, then they need to be taken seriously. In the future relationship, more detail should be sought on exactly which labour standards apply, going beyond general references to the ILO and the ESC. By comparison, there is actually more specificity in the Trade and Labour chapter of the Comprehensive Economic and Trade Agreement between the EU and Canada. The real weakness of the labour provisions in the Protocol lies in the limited and uncertain enforcement mechanisms in the event that they are breached. If a level playing field is to be guaranteed, then the standards agreed by the parties need to be matched by robust methods for enforcement.

[1] See: http://eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html

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