

# Regulating for Globalization

Trade, Labor and EU Law Perspectives

## The UK's Journey to Becoming a Sovereign Global Actor

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The adjustment that the UK will have to make to accommodate our post-Brexit global trade and security ambitions will involve enormous effort, ingenuity and change. No-one knows what the outcome will be.

For almost 50 years, the UK was a member of the European Union. The UK's trade policy was aligned to the Union in accordance with the treaties. UK law and courts had to act consistently with EU laws when operating within the field of EU competence. UK law was also highly influenced in its domestic development by EU law, and also by the ECHR in the field of human rights. The mutual influence between EU law and domestic law is the theme of Patrick Birkinshaw's *European Public Law: The Achievement and the Brexit Challenge* (Wolters Kluwer, 2020). The book explains how EU and ECHR law intermeshed with national laws and how the UK set about establishing its post Brexit legal framework.

With Brexit, the statement that EU law will lose its influence within the UK is simplistic. This is so for various reasons.

Firstly, the combined effect of the EU Withdrawal Act 2018 (EUWA) and EU Withdrawal Agreement Act 2020 (EUWAA) means that EU law will operate until the end of the Implementation Period (IP) – 31 December 2020. Post IP end-date EU law, including CJEU judgments, will not be binding on the UK. The UK will have no representatives in the institutions including the CJEU in the IP, but it will be bound by EU law and CJEU judgments in the IP and the UK will continue to pay its contributions to the EU until IP end-date.

Secondly, under the EU/UK withdrawal agreement (WA), rights for citizens will continue under mechanisms set out in the WA and these are under the jurisdiction of the CJEU. Northern Ireland remains under the EU customs union and many aspects of the single market to prevent a border on the island of Ireland. A border will exist between GB and NI. A whole raft of EU laws including state aids will apply in NI. The WA also provides for 'separation agreement law' to be under the jurisdiction of the ECJ.

Pre end-date IP EU law that is absorbed by the UK will take primacy over pre-end date IP domestic law and UK courts initially had to accept this primacy. However, an amendment to the EUWAA allows all specified courts to depart from CJEU jurisprudence and not simply the UK Supreme Court and High Court of Justiciary in Scotland as originally planned. We await the detail on this.

Under the Political Declaration on the UK/EU future relationship (PD), there was a commitment to 'a level playing field' in many areas including state aids, competition, taxation, environment, employment and social rights. However, the provision in the NI protocol (so-called Backstop) making this a legal requirement was removed as were the undertakings in the PD to accept these as commitments. The emphasis moved to a free trade agreement (FTA) in which the UK would apply by its own autochthonous standards. The fear amongst opponents of Brexit was that social and employment standards would collapse in the drive to turn the UK into a 'Singapore on the Thames' as they expressed it. In evidence they cited the removal of EU employment rights that were to be incorporated into post IP law from the EUWAA, although the government gave assurances that a separate bill would deal with employment rights.

The UK's ambition to assert total independence from the EU was evidenced in the changes to the non-legally binding PD but it was given maximum emphasis in the UK's statement of objectives on EU/UK trade negotiations. See "[The Future Relationship with the EU](#)".

The UK 'will not negotiate any arrangements in which the UK does not have control of its own laws and political life'. It is a vision of a relationship based on 'friendly cooperation between sovereign equals', with both parties respecting one another's legal autonomy and right to manage their own resources as they see fit (para 5).

There will be no extension of IP. A broad outline by June will be finalised by September 2020. There was to be no role for the CJEU under the FTA. The UK would not be aligned to EU law but would develop its own standards – presumably nothing would prevent these being very close to EU law. The UK wanted something akin to the Canada, Japanese or South Korean EU trade agreements. As well as FTA there would be separate agreements for distinct subject areas, covering, fisheries, transport, energy, aviation, mobility, participation in Union programmes and nuclear cooperation.

All these agreements should have their own 'appropriate and precedented governance arrangements'.

In financial services the UK seeks durable 'equivalence' assessments, not short-term approvals.

There would be a separate agreement in law enforcement and criminal matters. The agreement must not constrain the autonomy of the UK's legal system. It should not provide any role for the CJEU in resolving UK-EU disputes, which is consistent with the EU's approach to cooperation with third countries on law enforcement and judicial cooperation in criminal matters in agreements such as the Second Generation Schengen Information System (SIS II) and Prüm.

Cooperation in fighting crime will be underpinned by the importance attached by the UK and the EU to safeguarding human rights, the rule of law and high standards of data protection (para 31). The agreement should not specify how the UK or the EU Member States should protect and enforce human rights and the rule of law within their own autonomous legal systems. The EU has emphasised that the UK's failure to commit to the ECHR is a serious problem.

The UK will have its own policy on data protection and transfer to facilitate exchange of criminal records for DNA, finger-prints, vehicle registrations, Passenger Name Records, real time alerts. The UK will seek 'adequacy decisions' from the EU under both the General Data Protection Regulation and the Law Enforcement Directive before the end of the IP to ensure the continued free flow of personal data from the EEA States to the UK, including for law enforcement purposes

(60). A dialogue between data protection authorities will be maintained (62).

There would be cooperation with Europol, and cooperation on prisoner transfer but not within EAW. Asylum would be covered.

The UK proposes continuing to work with the EU in the area of civil judicial cooperation through multilateral precedents set by the Hague Conference on Private International Law and through the UK's accession to the Lugano Convention 2007.

Many policy areas – for example foreign policy or immigration policy – are for the UK Government to determine, within a framework of broader friendly dialogue and cooperation between the UK and the EU: they do not require an institutionalised relationship. The EU wishes to include foreign policy, security and defence arrangements.

There would be a reclamation and retention of UK fishing rights.

If no agreement could be reached by (June/July 20), the UK was prepared to walk and rely on WTO.

These ambitions are the polar opposites of several of the aims and objectives of the EU which is contained in [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_324](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_324)

While the objective is to have as close as possible a partnership with the UK, and Brussels is prepared to give the UK 'super-preferential access' to the EU market of 450 million people, there are particular problems:

1. Alignment with EU rules in essential areas and effective management and supervision, dispute settlement and enforcement arrangements (inc. CJEU).
2. The UK's failure to commit to maintaining the ECHR.
3. The UK's desire for a multiplicity of agreements in various subject areas whereas the EU prefers an overall comprehensive governance framework.
4. Differences in approach to fishing rights.

There is a long way to travel.

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(TEU and TFEU).“>EU Law, UK

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