

## Evidence to the EU Scrutiny Committee on the *Post-Brexit Scrutiny of EU Law and Policy Inquiry*

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This evidence was prepared as part of the [Performing Identities](#) research project, supported by ESRC grant reference [ES/S006214/1](#). Sylvia de Mars is a Senior Lecturer at Newcastle Law School, Newcastle University; Colin Murray is a Reader at Newcastle Law School, Newcastle University; Aoife O'Donoghue is a Professor at Durham Law School, Durham University; and Ben Warwick is a Lecturer at Birmingham Law School, University of Birmingham. This evidence draws upon our work for the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission on the [Common Travel Area](#), and our monograph, [Bordering Two Unions: Northern Ireland and Brexit](#), published in August 2018.

Given our areas of expertise, we are addressing the Committee's specific questions on 'Whether and how EU laws and policies might continue to affect the UK after Brexit' and 'What the purpose of scrutiny should be in a post-exit world' alone, with a particular focus upon Northern Ireland.

### WHETHER/HOW EU LAW/POLICY MIGHT AFFECT THE UK AFTER BREXIT

[1] As the Committee has requested case studies that illustrate whether and to what extent EU laws and policies might affect the UK under different Brexit outcomes, the commentary below addresses different discussed Brexit outcomes in the following order:

- A. A deal akin to the Withdrawal Agreement, including a transition period, *with* the Northern Ireland backstop
- B. A deal akin to the Withdrawal Agreement, including a transition period, *without* the Northern Ireland backstop
- C. A Future Relationship Agreement
- D. A 'No Deal' Exit

[2] We have opted to discuss both a Withdrawal Agreement with and without 'backstop' given the current impasse over how to proceed with Brexit. Inclusion of an option for a Withdrawal Agreement without a 'backstop' is not intended to suggest that it is our view the EU would be willing to negotiate such a deal, but rather an exploration of the particular implications of such a course. We must furthermore note from the outset that any arrangement under Scenario A and B would be adopted with the intention of moving to Scenario C in the medium term.

### EU LAW & POLICY EFFECTS UNDER SCENARIO A (WA, PLUS BACKSTOP)

[3] Under a deal akin to the Withdrawal Agreement, including a transition period and the backstop, EU law and policy will continue to have identical effects on the UK for the duration of the transition period.<sup>1</sup> This means that, in legislating for the Withdrawal Agreement, the UK will have to maintain the general application of EU law, including direct effect and supremacy, for the duration of the transition (this will require an amendment of the European Union (Withdrawal) Act 2018, insofar as it specifies the repeal of the European Communities Act 1972 upon the day of the UK's withdrawal). When the transition period

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<sup>1</sup> Articles 4 and 126 of the Withdrawal Agreement.

ends, unless ‘alternative arrangements’ regarding the Northern Ireland border have been agreed between the UK and EU, the backstop provisions of the Protocol on Ireland and Northern Ireland will enter into force, maintaining much of the architecture of the EU single market with regard to goods as it applies to Northern Ireland. Under the Withdrawal Agreement a much more limited range of EU law will continue to apply to the UK as a whole after the transition period.<sup>2</sup>

- [4] One specific exceptional element of EU law which will continue to apply to the UK as a whole after the transition regards EU Citizens’ rights (in Part II of the current Withdrawal Agreement). The continuation of preliminary references to the CJEU for a period of eight years following the end of transition means that the effects of EU law with regard to citizens’ rights will continue for this period of time.<sup>3</sup> This is independent of the fact that under the Withdrawal Agreement, new EU law on citizens’ rights would only apply to the UK if the UK and the EU agree in a Joint Committee that it *should* apply to the UK: the CJEU will continue to interpret the existing EU laws that apply under Part II until they are replaced or this period elapses, and as such will be clarifying EU law in a manner that the UK, under the Withdrawal Agreement, is obliged to respect.
- [5] More generally, under the Protocol on Ireland and Northern Ireland as currently agreed, the entirety of the UK will also remain in a customs territory with the EU, and will as such be subject to customs rules and certain ‘level playing field’ conditions.<sup>4</sup> These measures are intended to prevent restrictions at the land border on the island of Ireland and minimise restrictions between Northern Ireland and Great Britain. Under the backstop, the UK as a whole will therefore continue to apply relevant EU legislation, meaning that updates to the relevant EU laws will not apply to the UK, but UK cannot adopt standards lower than those applicable at the time of ratification of the Withdrawal Agreement.
- [6] Beyond these UK-wide effects, the ‘backstop’ elements of the Protocol on Ireland and Northern Ireland means that one constituent element of the United Kingdom (i.e. Northern Ireland) will remain subject to more significant elements of EU law and policy, at least until ‘alternative arrangements’ bring the backstop to an end. The relevant areas of EU law that will continue to be directly applicable to Northern Ireland are set out in the Annexes to the Protocol, and include areas such as VAT and excise, product standards for goods, agriculture (including state aid), the environment, electricity markets, certain technical standards relating to goods and the Union Customs Code.
- [7] This, however, does not mean that this additional EU law will only affect Northern Ireland. Article 7 of the Protocol on Ireland and Northern Ireland, as agreed, commits the UK to not only accept Northern Ireland products (complying with EU standards) onto the Great Britain market, but in Article 7(2) promises ‘best endeavours’ to ensure facilitate trade between Great Britain and Northern Ireland westward. The most obvious way in which to facilitate that trade is to not deviate significantly (or at all) from the relevant EU law measures, ensuring that there is significantly less reason to investigate goods crossing the border into Northern Ireland. In that scenario, the EU law that affects Northern Ireland as a rule is likely to have an ongoing effect on the remainder of the UK, to ensure the maintenance of the UK’s internal market vis-à-vis Northern Ireland.
- [8] The end effect of the Withdrawal Agreement as drafted is consequently that EU law as a whole will continue to affect the UK until the end of a transition period, and some EU law (relating to customs and ‘level playing fields’ in other areas) will continue to apply to the UK as a whole indefinitely (or until the backstop ends), and even more extensive EU single market law relating to goods will apply to Northern Ireland under the ‘backstop’.

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<sup>2</sup> Article 185 of the Withdrawal Agreement.

<sup>3</sup> Article 158 of the Withdrawal Agreement.

<sup>4</sup> The customs territory covers all products except for trade in fisheries and aquaculture products, which should be the subject of a further agreement on fishing opportunities by 1 July 2020 under Article 6 of the Protocol.

## EU LAW & POLICY EFFECTS UNDER SCENARIO B (WA, MINUS BACKSTOP)

- [9] A deal without the backstop would raise serious issues with regard to the Belfast/Good Friday Agreement which are beyond the scope of this evidence. Under a deal akin to the Withdrawal Agreement, including a transition period, EU law and policy will most likely continue to have identical effects on the UK for the duration of the transition period. As stated above, when the transition period ends, most of the provisions of EU law will cease to apply to the UK (excepting the areas covered within the Withdrawal Agreement). Insofar as the UK continues to wish to be in a customs territory or customs union arrangement with the EU, the relevant provisions of EU law pertaining to customs will continue to apply to the UK.
- [10] All other EU law will, in principle, have a policy effect rather than a legal effect on the UK. The closer a relationship the UK will wish to have with the EU at the end of this transition period, the more likely it will be that EU legal regimes have a significant impact on UK law and policy. Great deviation will make a future relationship agreement either more limited in scope, or more difficult to conclude. Even outwith a future relationship agreement (discussed next), the extent of deviation from EU policy and law will have a significant effect on how the UK can access the EU market.
- [11] Data protection law provides a simple example to illustrate this point. Should a new UK regime fail to be declared adequate by the EU Commission, engagement with EU institutions and even private contractors will be significantly more limited than if a post-Brexit UK data protection regime is declared adequate. If it is declared adequate, however, it is likely that it is more akin to the relevant EU regime even if not identical to it.
- [12] As such a desire for a close relationship in certain fields with the EU will undoubtedly mean significant effects stemming from EU law and policy in the UK in those sectors. Where the UK has indicated it wishes to deviate significantly—e.g. in (financial) services or in the digital sector—EU law and policy is likely to have little effect, unless the EU strongly influences what international standards apply to those sectors. The degree of legislative alignment with the EU determines that the UK Parliament might want to maintain a special degree of scrutiny of EU legislation.

## EU LAW & POLICY EFFECTS UNDER SCENARIO C (FUTURE RELATIONSHIP)

- [13] Following a Withdrawal Agreement, the UK will either find itself attempting to negotiate scenario C (a future relationship) or in scenario D (no deal). The starting point of both scenarios is that EU law in principle no longer applies to the UK.
- [14] Where the Future Relationship differs from ‘no deal’ is that it is premised on negotiating a number of areas in which close ties with the EU continue, as discussed above. In general terms, the Political Declaration sets out numerous areas of future collaboration and cooperation. If such cooperation and collaboration manifests, EU policy will at the very least be taken into consideration when developing UK law and policy.
- [15] Articles 11 and 12 of the Political Declaration make clear that the UK Government sought ongoing close collaboration with the EU in a number of fields that would actually require compliance with relevant EU legal instruments:

*Noting the intended breadth and depth of the future relationship and the close bond between their citizens, the Parties will establish general principles, terms and conditions for the United Kingdom’s participation in Union programmes, subject to the conditions set out in the corresponding Union instruments, in areas such as **science***

**and innovation, youth, culture and education, overseas development and external action, defence capabilities, civil protection and space.** These should include a fair and appropriate financial contribution, provisions allowing for sound financial management by both Parties, fair treatment of participants, and management and consultation appropriate to the nature of the cooperation between the Parties.

The Parties will also explore **the participation of the United Kingdom to the European Research Infrastructure Consortia (ERICs)**, subject to the conditions of the Union legal instruments and individual ERIC statutes, and taking into account the level of participation of the United Kingdom in Union programmes on science and innovation.

- [16] Regarding the future economic partnership, Articles 24 and 25 again make clear that UK alignment to aspects of EU law (and in this case, EU regulation) was foreseen by the parties:

*While preserving regulatory autonomy, the Parties will put in place provisions to promote regulatory approaches that are transparent, efficient, promote avoidance of unnecessary barriers to trade in goods and are compatible to the extent possible. Disciplines on technical barriers to trade (TBT) and sanitary and phytosanitary measures (SPS) should build on and go beyond the respective WTO agreements. Specifically, the TBT disciplines should set out common principles in the fields of standardisation, technical regulations, conformity assessment, accreditation, market surveillance, metrology and labelling. The Parties should treat one another as single entities as regards SPS measures, including for certification purposes, and recognise regionalisation on the basis of appropriate epidemiological information provided by the exporting party. The Parties will also explore the possibility of cooperation of United Kingdom authorities with Union agencies such as the European Medicines Agency (EMA), the European Chemicals Agency (ECHA), and the European Aviation Safety Agency (EASA).*

***In this context, the United Kingdom will consider aligning with Union rules in relevant areas.***

- [17] While it is obviously not clear from the Political Declaration just what *volume* of EU law would continue to affect UK domestic law, it is clear that any future relationship of the depth that the May Government pursued would encompass a clear awareness of EU policy in areas such as foreign affairs and security and close alignment to EU policy and law on trade-related matters.
- [18] A further point is that the UK, under the Belfast/Good Friday Agreement, is committed to a range of measures of North/South cooperation. The imperative to maintain, and the possibility of extending, North/South cooperation will require a level of alignment between the law of Northern Ireland and EU law.
- [19] It is unclear at this time if the Political Declaration still broadly indicates the direction the UK wishes to travel vis-à-vis the EU after Brexit, but the general observation that where it wants a close relationship, it is likely to be affected significantly by relevant EU law and policy in those areas on an ongoing basis, albeit without the oversight and enforcement of the Commission and the CJEU, and without the participation in legislative processes currently held in the Council (and the European Parliament, indirectly). Extensive areas of alignment under a Withdrawal Agreement likely necessitate continuing specific Westminster scrutiny of EU law.

## **EU LAW & POLICY EFFECTS UNDER SCENARIO D (NO DEAL)**

- [20] ‘No deal’ is used as a term to discuss two very different scenarios. The first of these is a pure no deal, which involves the Article 50 TEU period running out (without extension) and no international agreement covering future UK-EU relations being reached. The second manner in which ‘no deal’ is used proposes a wide variety of separate small deals concluded with the EU for the sake of maintaining continuity in those sectors in which the UK desires such continuity – transport being a prominent example.

- [21] It is necessary, from the outset, to note the EU's stated antipathy towards the second form of 'no deal', which we shall term the 'mini deals' scenario. Were the EU position to change, however, those 'mini deals' are likely to consist of the EU temporarily recognising UK law that remains *unchanged* from EU law upon 'exit', so as to mitigate the effects of Brexit on trade and people. When the March 29 deadline loomed, we saw examples of these types of unilateral and temporary recognition arrangements being put in place.
- [22] We believe there is no point in considering whether the EU would accept a version of 'mini-deals' in which the relevant UK rules deviate from existing EU standards. The reality is that, for the sake of the integrity of the internal market and what products and services move around the internal market, it simply could not do this as anything other than a short term measure to address urgent dislocations.
- [23] By contrast, with regard to a pure *no deal* scenario, it is difficult to speculate on the impact of such a vacuum. The effects of EU law and policy in the event of an actual *no deal* would be, theoretically, nil, with the exception of those areas in which the EU plays a dominant role in developing international standards that the UK is likely to adopt regardless of Brexit. One might even observe that the *point* of an actual *no deal* is to eradicate the influence of all EU law and policy on the UK. This is possible, as a matter of legislative practice, but it is highly debatable if it is politically and economically sustainable. It goes without saying that in either of these scenarios, in the absence of 'mini-deals' that cover the Northern Ireland border, Brexit would undermine the North/South cooperation elements of the Belfast/Good Friday Agreement.

## THE PURPOSE OF POST-BREXIT SCRUTINY

- [24] Given the above descriptions of different Brexit scenarios, it seems clear that in virtually all conceivable long-term scenarios EU law and policy will continue to have an impact upon UK domestic policy – both directly and indirectly, depending on the extent of post-Brexit relationship the UK seeks with the EU. When the UK Government's express position is that it wishes to continue to develop and negotiate arrangements with the EU, it seems highly advisable for the UK to maintain scrutiny of relevant EU law even when it is not a Member State. Under a range of conceivable future 'deals', the UK will opt into parts of the EU acquis, and those should become a focus of the work of the EU Scrutiny Committee.
- [25] The likelihood of specific arrangements for Northern Ireland also necessitate ongoing scrutiny of EU law and policy relating to the free movement of goods. Given the nature of the current backstop arrangements, these work in tandem with whole-UK arrangements, and should be primarily addressed by the EU Scrutiny Committee. If, in any amendments to the Withdrawal Agreement, special arrangements apply more specifically to Northern Ireland, scrutiny arrangements could focus upon the Northern Ireland Affairs Committee (in addition to arrangements within the Northern Ireland Assembly). However, the specialised expertise of the EU Scrutiny Committee may, even in these circumstances, be important to maintain.
- [26] As a former Member State, the UK's ability to influence the direction of travel of EU law and policy will diminish. It will no longer participate in any EU decision-making bodies and, under the Future Relationship as currently proposed, will not have observational powers akin to an EEA Member State. Nonetheless, procedures akin to those adopted by Norway, with regard to the early stages of legislative activity,<sup>5</sup> will be essential if various aspects of EU law continue to (directly or indirectly) apply to the UK.

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<sup>5</sup> See the Norwegian Ministry of Foreign Affairs, 'The EEA Agreement and Norway's Other Agreements with the EU' (2012-2013) Section 2.2, available at [https://www.regjeringen.no/globalassets/upload/ud/vedlegg/europa/nou/meldst5\\_ud\\_eng.pdf](https://www.regjeringen.no/globalassets/upload/ud/vedlegg/europa/nou/meldst5_ud_eng.pdf) - 'Within the framework

Full participation in the EU legislative process will not be negotiable for the UK (it is not enjoyed by EEA Member States), but domestic scrutiny of EU obligations would mean that the UK effectively can nonetheless assess whether a relevant change to the EU acquis does not work well for the UK. An observational role, with an ability to feed back to the EU decision-makers on, in particular Northern Ireland-relevant EU legislative proposals as they are being developed, is thus highly desirable.

- [27] As for Parliament's role in influencing EU policy and law, this too would have to take place via informal channels. Perhaps a model to pursue would be inter-parliamentary cooperation fora set out in EU Association Agreements, should the EU prove amenable to this. Alternatively, Parliamentary efforts at the Northern Ireland Affairs Committee (or an equivalent) to oversee the backstop would also be a means of involving Parliament in post-Brexit EU policy development.
- [28] As for information and communication generally, geography alone suggests that it is in the UK's best interest to maintain closely apprised of what legislative and policy developments are taking place within the regional 'bloc'. At a minimum, reports following the annual EU State of the Union address – indicating its key points – with updates on how EU law in those areas is progressing would be welcome at a Parliamentary level. In collaboration with specialist committees such as the Northern Ireland Affairs Committee, reports on EU policy and law that are of great significance to a sector or area of the UK that continues to be closely aligned to the EU are also highly desirable.
- [29] As for informing the public, it would be helpful if EU Scrutiny could act as a triage centre for relevant EU law developments, forwarding them to other departments and committees as appropriate, so that they can take responsibility of updating stakeholders in those specific sectors or regions.

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of Norway's agreements with the EU, Norway has greatest opportunity to participate in the development of EU policy and legislation at an early stage of the legislative process, i.e. during the preparation of Commission proposals and during preliminary discussions in the Council of the EU (the Council) and the European Parliament.'