

Brexit Editorial, Volume 24, Issue 2 (June 2018)

The publication of this editorial comes almost two years since the referendum decision to leave the EU. Far from becoming clearer the waters become ever muddier. The first part of 2018 witnessed two major points of development in the future UK/EU relationship. The first was the shape of an interim or transition or implementation period post Brexit in which the UK would remain bound by Union law and continue to be a part of the single market and customs union. Any transition agreement would be attached to the withdrawal agreement. It was hoped to settle terms for an implementation period by 31 March 2018. The second was the introduction and progress through Parliament of the European Union (Withdrawal) Bill the proposals and content of which were outlined in a previous editorial.¹

In an appearance before the Select Committee on Exiting the EU before the second phase of negotiations commenced in London, Mr Davis stated in relation to the future relationship, and the major points of the transition period, with the EU: 'All of those require the substance of the future relationship to be concluded at the start of the transition, not at the end. If you have it at the end, it is not a transition any more; it is something else.'² One usually wishes to know where one is going before setting off. This timing now seems most unlikely. The discussions with M. Barnier on transition (or implementation)³ did not progress smoothly in that the Union negotiator made it clear the UK would not be permitted to negotiate trade deals with third parties without permission within that period and may not benefit from EU trade deals either. Furthermore, the UK would be bound by EU law within the transition period and would be subject to the jurisdiction of the Court of Justice of the EU (CJEU). This would include laws that are adopted during the transition period without the UK having a say in their

¹ Brexit Editorial, 23 Eur. Pub. L. 437 (2017).

² Davis before Brexit Committee 24 Jan. 2018:
<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/exiting-the-european-union-committee/the-progress-of-the-uks-negotiations-on-eu-withdrawal/oral/77453.html> Q 706 (All sites accessed 19 Feb. 2018).

³ Commission statement on Directive for Transition period on 29 Jan. 2018:
http://europa.eu/rapid/press-release_IP-18-463_en..htm XT 21004/ADD i Rev 2
Barnier's press statement 29 Jan. 2018:
<https://www.politico.eu/article/michel-barnier-uk-cant-make-trade-deals-during-brexit-transition/>
and
http://europa.eu/rapid/press-release_SPEECH-18-507_en.htm.

content. In special cases, the UK might be invited to attend without voting rights, when it is in the interest of the bloc.

M. Barnier argued on Monday 29 January that the EU set out these conditions because the UK had asked for a transition period which maintained the status quo. The UK would wish for some form of mediation to achieve a degree of adjustment/qualification in laws to which they did not contribute.⁴ This does not seem unreasonable. Reports were released that the Commission had warned of trade sanctions against the UK if the UK breached the agreement on transition.⁵ Mr Davis responded by calling the document ‘discourteous’.⁶ A commission statement also included limitations on UK rights.⁷ A further sticking point arose when Mrs May remarked that EU citizens arriving in the UK after the transition period commenced would not acquire the full rights of those arriving before exit day.⁸ This position was reversed in the publication of the provisional agreement on withdrawal on 19 March (below). Assertive comments from Mrs May are juxtaposed with placatory overtures revealing the tension in trying to accommodate two opposing factions within her own Cabinet, let alone party, while conducting sensitive epoch shaping international negotiations. On 9 February, M. Barnier warned that a transition period, ending at the end of 2020, is not a given if substantial disagreements remain. A ‘soft’ Irish border still requires clarification and detailed resolution. The UK published its draft text for discussion of proposals for the implementation period on 21 February.⁹

The second development is the EU (Withdrawal) Bill (EUW). The bill commenced its Parliamentary process, along with two trade bills, pointing to a Brexit future.¹⁰ EUW will repeal the European Communities Act 1972 and end preliminary references on exit day. The EUW began its Lords scrutiny at the end of January. The bill’s introduction was presaged by a scathing report from the Lords Constitution Committee on the bill’s content. The bill was described as being ‘fundamentally flawed from a constitutional perspective in multiple ways’ and ‘constitutionally

⁴ For Mr Davis’ views on an arbitral mechanism see his appearance before the Lords EU Select Committee:

<http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/news-parliament-2017/david-davis-evidence-january-2018/>.

⁵ <https://euobserver.com/uk-referendum/140881>.

⁶ <https://euobserver.com/uk-referendum/140925>.

⁷ EU Commission, *Transitional Arrangements in the Withdrawal Agreement* (7 Feb. 2018), <https://ec.europa.eu/commission/sites/beta-political/files/transition.pdf>.

⁸ A Dutch Court has made an ECJ reference to rule on post Brexit EU citizenship rights of UK citizens living in Holland: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:605>.

⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/682894/Draft_Text_for_Discussion_-_Implementation_Period__1_.pdf.

¹⁰ The Taxation (Cross-border Trade) Bill and the Trade Bill. An implementation bill will be introduced in the Autumn.

unacceptable' as drafted.¹¹ It could be saved, the Committee reported, by necessary amendment. The Committee left no part of the bill's intentions unscathed. These include retaining EU law post Brexit – the date of Brexit in the bill has been amended in the Commons to give flexibility – and includes domestic EU law, direct EU law and treaty rights. The first embraces EU law implemented by UK and devolved legislation and delegated legislation. The second basically involves 'direct EU law' via EU regulations and decisions and annexes to EEA agreements having effect in EU law – in all cases with exceptions. The third involves directly effective rights under treaties and directives, but only where recognized as such before departure day. This law will be retained on exit day (11pm, 29 March 2019) and its supremacy over pre-exit domestic law will still be recognized. Subsequent EU law will not be so recognized. Retained law may be modified by delegated powers or devolved powers.

In interpreting pre exit EU law, UK courts will abide by the decisions of the CJEU and domestic judgments in pre exit case law. They are not bound by CJEU judgments or other EU entities made after exit day but may have regard to these only 'where they consider it appropriate to do so' (clause 6(1)(2)). A previous editorial referred to the inadequate 'vagueness' of this guidance. The UKSC and High Court of Judiciary (the highest criminal appellate court in Scotland) are not so bound but may depart in the same manner as they can from a previous judgment of those courts.

The inadequacy of the scrutiny powers of Parliament over the EUW's delegated legislation has been subject to searing criticism as a previous editorial observed. Brexit will foment an unprecedented body of executive law-making. It appears likely that the devolved aspects, along with all areas of the bill, will be severely criticized in the Lords for breaching devolved settlements. The Constitution committee reported:

The Bill envisages the transfer of competences from the EU level to the UK Government but does not provide clarity and certainty as to which powers will then be devolved and on what timescale. That some of these powers fall within areas of existing devolved competence has raised concerns in the devolved administrations.¹²

The failure to retain the Charter of Fundamental Rights (CFR), but to retain the underlying rights it represents, seems set to create unnecessary uncertainty and confusion. Its removal is a part of ideological opposition to 'European human rights' that drives the Brexiteers. It is tied up with the 'vassal state' concept emerging from UK subjection to foreign courts and law.¹³ The former Attorney General Dominic Grieve attempted unsuccessfully to move an amendment retaining the Charter of Fundamental Rights (CFR).

¹¹ Lords Constitution Committee, *European Union (Withdrawal) Bill*, HL 69 (2017–2019), https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/69/6903.htm#_idTextAnchor003Summary.

¹² *Ibid.*

¹³ Jacob Rees Mogg MP: https://twitter.com/jacob_rees_mogg/status/941966417511047168?lang=en.

The power for the executive to make alterations to EU retained law to counter deficiencies or maintain its efficacy and to comply with international obligations is in addition to powers to make regulations for the withdrawal agreement itself. The latter regulations might cover the status of CJEU judgments in cases involving UK litigants in litigation at the point of Brexit but before judgment, or for regulatory approval for UK goods. Here an important amendment in the Commons, against the government's wishes, states that the rule-making power relating to the agreement is subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal (clause 9(1)). By this indirect means Parliament secured its vote in legislation on the withdrawal agreement.

The transition period, and being subject to EU law and the European Court of Justice (ECJ), does not sit squarely with the intentions of the EUW. An indication of the underlying uncertainty came from Mrs May in her Munich speech on 16 February 2018 on internal and external security and which came after government papers on police and criminal cooperation and defence and foreign policy. In her speech she said a future UK-EU security treaty:

must be respectful of the sovereignty of both the UK and the EU's legal orders. So, for example, when participating in EU agencies the UK will respect the remit of the European Court of Justice. As I have said before, we will need to agree a strong and appropriate form of independent dispute resolution across all the areas of our future partnership in which both sides can have the necessary confidence.¹⁴

This apparently meant paying 'due regard' to ECJ rulings not following them. In a transition period everything is as it was, including the jurisdiction of the ECJ. That seems to be the drift so far. Under the EUW, if the ECJ judgments relate to freedom, justice and security items the UK has opted into and they pre date departure (D) Day they would be binding as described above. After the transition period the UK would no longer be a party to those agreements. Hence the requirement for new agreements. A Minister before the Lords EU Committee said: 'Where agreements between the UK and EU give rise to rights or obligations for individuals those rights or obligations **will be enforced** by the courts in the UK, and ultimately by the UK Supreme Court.'¹⁵ This seems to be a part of agreements operating post Brexit whether concluded before or after Brexit. There is much to agree upon to determine what is 'practical and pragmatic' to use Mrs May's words, in protecting our future security.

¹⁴ <https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018>.

¹⁵ Lords debate on the Select Committee on the EU report *European Arrest Warrant* (8 Feb. 2018), emphasis added: [https://hansard.parliament.uk/lords/2018-02-08/debates/BBC8CBD4-A7D7-4BB3-A3CF-33E4B503C915/BrexitEuropeanArrestWarrant\(EuropeanUnionCommittee\)](https://hansard.parliament.uk/lords/2018-02-08/debates/BBC8CBD4-A7D7-4BB3-A3CF-33E4B503C915/BrexitEuropeanArrestWarrant(EuropeanUnionCommittee)) I am grateful to Baroness Ludford for this link.

However, if a dispute mechanism for individuals is involved in a treaty then it is most unlikely that disputes may be resolved by one side acting alone. There would have to be a component representing the other side(s) at some stage. The ECJ could not be avoided. Given its jealous protection of its own jurisdiction and prerogatives and the integrity of EU law under the treaties it will not cede its position. It has shown no inclination to do this in the past.¹⁶ A central theme will be exchange of personal data for reasons of security under numerous arrangements: ‘We must also recognise the importance of comprehensive and robust data protection arrangements’ said Mrs May at Munich. The CFR is essential in such exchanges but the government wishes to jettison the Charter. There is a basic problem in UK politicians failing to understand the requirements of a multi-national EU law-based system that will not allow itself, or its law, to be compromised through ‘pragmatism and practicality’.

Needless to say, the melodramatic declarations and bad theatre continue to accompany the Brexit cavalcade. Notable were Jacob Rees-Mogg’s criticism (who has emerged with astonished incredulity as a future front-runner to Mrs May’s prime ministerial office) of HM Treasury papers predicting adverse economic impact on the UK from various analyses after Brexit. Their models were skewed he said!¹⁷ ‘Fake news’ another might twitter! The government only allowed the papers to be published in the House of Commons library where MPs will get access. Wait for the Freedom of Information requests! The other was the foreign secretary’s attempt to win over remainers. The speech displayed all the weaknesses of Johnson’s superciliousness and superficiality. Any attempt by government figures to seek an economically emollient departure – a departure that would leave the UK close economically to the EU – is rubbished by the anti EU press. Such a suggested departure by Philip Hammond was subjected to such treatment.¹⁸ However, the Chancellor seemed to find an ally in David Davis who called for regulatory alignment post Brexit: ‘the future of standards and regulations – the building blocks of free trade – is increasingly global’ – ‘We start from a position of total alignment.’¹⁹

That was not the message that emerged from Mrs May’s meeting with the Brexit sub-committee of the Cabinet at the end of February. The outcome seemed to be managed, variable, sectoral, regulatory divergence. This was followed by the leader of the Labour party declaring the party’s support for a customs union with the EU after Brexit but with built-on additions. It would introduce for the first

¹⁶ European Court of Justice *Opinions* 1/92, 1/00, 2/13.

¹⁷ <https://www.theguardian.com/world/2018/jan/30/tuesday-briefing-leaked-paper-reveals-brexits-impact>.

¹⁸ <http://www.telegraph.co.uk/politics/2018/01/26/philip-hammond-launches-outspoken-attack-euro-sceptics-calls/>.

¹⁹ <https://www.gov.uk/government/news/david-davis-foundations-of-the-future-economic-partnership-speech>.

time clear division between Labour and Conservative policy on Brexit and could force the issue in a Parliamentary vote in the Trade Bill. Muddy waters indeed.

On 19 March, a provisional agreement between the UK and EU on UK withdrawal and transition was published by the Commission.²⁰ This confirmed the supremacy of EU law, and the jurisdiction of the CJEU, in the transition period and a continuing role as indicated in previous editorials thereafter. There were concessions on both sides (notably by the UK) on citizen rights and fisheries and the UK's ability to negotiate and sign trade deals in the transition was agreed. The provisional acceptance of the supremacy of EU law in the transition until 31 December 2020 places the timing stipulated in the EU Withdrawal Bill (above) in doubt. On 23 March the EU summit approved the guidelines for negotiations on the post Brexit relations between the EU and UK and endorsed the draft agreement on withdrawal and transition reached by M Barnier and David Davis. Key issues, including Ireland, remained to be settled.²¹ It was hoped to conclude the withdrawal by October 2018.

The Editor,
23 March 2018.

²⁰ Draft EU/UK EU and Euratom Withdrawal Agreement 19 March 2018: https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf (accessed 20 Mar. 2018).

²¹ <http://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf>.