

# Studying EU Law in Scotland during and after Brexit

Open Access Resource

First Edition

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In collaboration with the  
Scottish Universities  
Legal Network on Europe





PUBLICATION FROM

**Scottish Universities  
Legal Network on Europe**

[sulne.ac.uk](http://sulne.ac.uk)



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First Edition – Published October 2017

Design and typesetting by Anthony Salamone

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# Foreword

Noreen Burrows *University of Glasgow*

Jo Shaw *University of Edinburgh*

Co-Chairs of the Scottish Universities  
Legal Network on Europe

The first, perhaps apocryphal, story regarding the teaching of EU law after Brexit was the one about the enterprising student who phoned the Law Society of Scotland on 24 June 2016 and asked whoever they got through to whether or not they really had to do their EU law resit examination. It appears that they received a dusty response: Oh yes, you do.

Joking aside, it is clear that the teaching and learning of EU law has never been *more important* than it is now. For years, those of us who have taught EU law at various levels in universities have struggled with raising interest in the concept of the non-tariff barrier to trade in goods. Endless bottles of *Cassis* have been supped in class in the search for enlightenment. It was certainly hard to find examples of media discussions of basic internal market trade law issues, even in the field of services, that could bring the importance of these matters to the modern economy alive for students. In the constitutional sphere, there remained a residual sense even amongst legal academics that EU law was somehow separate to the core UK legal order.

Now, of course, although the newspapers and other broadcast and web outlets for news and commentary still contain more than a modicum of misleading and frankly incorrect reports about EU law, there is a great deal more informed reporting and informed commentary than ever before. Legal academics have been to the fore – especially on social media, where they have tried to correct many a misapprehension. Activities in the legal sphere, including the *Miller* case and the precise and illuminating work by some parliamentary committees, have painted an alarming picture for all to see of just how badly the UK’s constitutional fabric might be ripped apart (in relation to matters such as parliamentary oversight of the executive, protection of human rights and the territorial dimension) by a badly conceived and implemented Brexit.

With the UK – at the time of writing – still contemplating what might precisely be its legal status after 29 March 2019, it is more important than ever that law students, and any other interested parties – whether in universities or beyond – who come across our open access materials, are fully informed about the character of those different options, whether for a transition towards an EEA-type option or a so-called ‘cliff-edge’ Brexit with WTO rules coming immediately into play.

We are very grateful to our colleagues in the Scottish Law Schools (and in a few cases beyond – both in geographical and disciplinary terms) for putting together this important project under the umbrella of the [Scottish Universities Legal Network on Europe](#) (SULNE), making full use of the flexibility and immediacy of internet technology. In particular, we would like to thank Nicole Busby and Rebecca Zahn of Strathclyde Law School for taking a leading role and coordinating and directing this work, and the [Society of Legal Scholars](#) for providing funding to support the project.

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It is important to stress that this is 'work-in-progress'. Best endeavours have been made to ensure the accuracy at the time of writing and 'publishing', but we are interested in ensuring that this process is dialogic with its readership. Do get in touch with us if you have comments or suggestions to make.

# Chapter 1

## Introduction

Nicole Busby *University of Strathclyde*

Rebecca Zahn *University of Strathclyde*

The idea for this book originated from a one-day seminar which was held at the University of Strathclyde in May 2017 as part of *Engage with Strathclyde 2017* at which academics, students, practitioners and representatives from the Law Society of Scotland and the Faculty of Advocates met to discuss how best to teach EU law in Scotland during the Brexit negotiations and following the UK's departure from the EU. The event was organised in collaboration with the [Scottish Universities Legal Network on Europe](#) (SULNE) and was generously funded by the [Society of Legal Scholars](#).

Perhaps unsurprisingly, the main theme which emerged from our discussions at the seminar was uncertainty. Although all participants were in agreement that EU law should most definitely continue to be included in the legal education syllabus in Scotland for the foreseeable future, we also agreed that it was difficult if not impossible to determine exactly what form its inclusion should take. Additional challenges were identified when it came to deciding how to guide students in their reading and research. Textbooks are likely to go out of date rather quickly and the UK's uncharted and fast-changing position means that books written for mainstream students of EU law in other (continuing) Member States will need to be supplemented with specialised reading for UK and, in some contexts, Scottish-specific audiences. Although there are a plethora of online resources available, these are written and published by a variety of organisations and individuals and their suitability as authoritative legal texts varies considerably.

We concluded by setting ourselves a challenge – how could we help students (and ourselves) to make sense of EU law as the Brexit negotiations unfolded? The result is this e-book which has been written as a collaborative venture between academics across and beyond Scotland who have spent many years teaching in and reading, researching and writing about their respective fields of expertise. It also contains contributions from Rob Marrs of the Law Society of Scotland and Kirsty Hood QC of the Faculty of Advocates. We extend our thanks to Nina Miller-Westoby and Anthony Salamone for editorial assistance.

This is not a traditional textbook. It does not provide detailed coverage of all aspects of the relevant law and it is intended to be used in a particular way. Chapter 2 on [Study Skills](#) provides advice about how to stay up to date, and reminds students to refer to primary sources as the starting point when exploring any area of law. Chapters 3 to 17 provide overviews and Brexit-related analyses of a range of substantive areas of EU law. These chapters are intended to give sufficient background information on their respective topics to equip the reader with the necessary understanding to be able to engage in critical further reading.

These chapters aim to supplement – not replace – mainstream reading, be it from textbooks, journal articles, professional publications or other secondary sources. The Further Reading section at the end of each chapter is purposefully 'light touch' so that students are expected to identify and access other sources by continuing to

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refer to course reading lists and by conducting their own searches of appropriate legal databases, alongside the mainly online sources to which this book directs them. In recommending particular sources, the chapter authors have cast their discerning eyes over the range of materials available and selected those which are most suitable in terms of usefulness and authority. The intention is to keep these recommendations updated on a regular basis. Indeed the chapters' authors will endeavour to update the whole text on a regular basis so that the legal implications of the UK's negotiations with the EU and their impact on both EU and UK law are reflected in the book as events unfold.

In pooling our resources and working together on this book, the Scottish Law Schools have produced what we hope will be a useful guide for all those who need to stay informed and up to date as the UK government's negotiations regarding our future relationship with the EU develop. The electronic format has been chosen because of its accessibility, both for authors, who can update their chapters more easily and quickly than traditional publications, and for students, who are provided with a free and easy to use study aid.

We hope that the book fulfils its purpose effectively in helping us all to understand what Brexit means, what its impact will be on the UK's relationship with the EU and any specific implications that may have for Scotland.

Do get in touch with us if you have comments or suggestions to make.



## Chapter 2

# Study Skills

Maria Fletcher *University of Glasgow*

Tamara Hervey *University of Sheffield*

Sarah McCloskey *University of Sheffield*

Lawyers and legal scholars always need to be sure that they are working from the most recent legal texts. Being up to date with the law is even more critical at a time of rapid political change, such as the period following the triggering of Article 50 TEU. It is important that lawyers understand the legal ramifications of political developments, and follow proposed new legal texts, as well as being on top of the latest legal position.

But to understand the latest legal position, often we need to understand the history. What is now the European Union (EU) came from the European Community (EC) and before that the European Economic Community (EEC). Each of these [phases of European integration](#) involved different legal texts.

To better understand the changing legal landscape and consequences of the UK leaving the EU, and the future EU-UK relationship(s), we need to follow the position both from the point of view of the EU – its laws and legal institutions (its legislature, its courts); and from the point of view of the UK – its laws and legal institutions, including of course the devolved nations/regions.

### Key Sources and Resources: Primary Legal Sources

As lawyers, we should reach first for **primary legal sources**. When the law is changing, we also need to be mindful of both laws and political practice that determine the **procedures** by which those changes are made.

#### *Key Sources and Scope of EU Law*

The single authoritative source of all EU law is [EUR-Lex](#). This gives texts of the EU's primary law (treaties), secondary legislation (principally, Directives, Regulations and Decisions), and the case law of its courts (Court of Justice of the European Union (CJEU) and General Court). The two key EU treaties are the [Treaty on European Union](#) (TEU) and the [Treaty on the Functioning of the European Union](#) (TFEU). If you are unclear on these distinctions, see [this guide](#). If you do not already know how to use EUR-Lex, several [tutorials](#) are available.

The EU may only adopt legislation in accordance with the powers (or *competences*) given to it in the treaties – the EU is a body of 'constrained' or 'limited' competence. The EU has [exclusive](#) (or full) competence in some policy fields and it has much weaker [supporting](#) powers in other fields. However, in the large majority of policy fields covered by EU law, competence is [shared](#) between the EU and its Member States. The [principle of subsidiarity](#) governs whether the EU should exercise such shared powers (as opposed to Member States or sub-national authorities). A [glossary](#) of key terms concerning competence is available.

In 2013-2014, the UK government conducted a comprehensive review of the [balance of competences](#) between the EU and the UK, to audit what the EU does and how it affects the UK. The review found that, on balance, the allocation of competences between the EU and its Member States is about right, but the UK government [never promoted](#) this conclusion.

Key principles of EU law outline how EU law and national law interrelate. Some EU primary and secondary law has [direct effect](#), that is to say it is the source of rights enforceable before national courts in the Member States. The CJEU is the [authority](#) on questions of the interpretation and validity of EU law. Validly adopted EU law enjoys [primacy](#) (sometimes known as *supremacy* or *precedence*) over national law.

Following the Brexit process means following the EU's treaty law, because the process by which a Member State leaves the EU is set out in Article 50 TEU. This process will determine the adoption of the UK's Withdrawal Agreement. After notification, a Council of the EU27 negotiates with the leaving Member State. The European Parliament must consent. If no agreement is reached after two years, the leaving Member State is deemed withdrawn, unless agreement to extend this period is reached. The two year period for the UK to negotiate its withdrawal from the EU ends on 29 March 2019. The EU's negotiating positions are transparent and [publicly available](#).

The process by which the EU adopts a new treaty with a non-EU country is in Article 218 TFEU. This will be the process by which the EU-UK relationship is legally defined in the future (i.e. post-withdrawal). Recent practice of the EU is to make its negotiating positions for new trade treaties [transparent](#).

It is possible that there will be challenges to the withdrawal agreement and any future EU-UK agreements before the CJEU. For instance, the European Parliament has indicated that it will veto the withdrawal agreement if it fails to protect EU citizens' 'acquired rights'. The European Parliament might also rely on Article 263 TFEU to challenge the withdrawal agreement, or any future EU-UK agreements, on the grounds of 'infringement of the Treaties, or any rule of law relating to their application'.

A recent case in which a free trade agreement was challenged is the [Singapore FTA case](#). In this case, the Commission sought an Opinion from the Court under Article 218(11) TFEU on the allocation of competences between the EU and the Member States as regards concluding the Free Trade Agreement envisaged between the EU and the Republic of Singapore. This, and other case law on the EU's [External Relations](#) competences, provide important legal context in terms of what the EU may (and may not) agree with the UK for the future. There was to have been a case seeking to determine whether Article 50 TEU is revocable, but this has been [withdrawn](#) (click on *Case updates*).

### **Key Sources UK Law**

The sources of 'UK' law consist of: statute; delegated (or secondary) legislation; and case law. Legislation can be found on the [official website](#) or you can access all sources on the legal database to which your university subscribes, for example, [LexisNexis](#) or [Westlaw](#), each of which has its own 'how-to' tutorials.

Importantly, the term 'UK law' although commonly used, is something of a misnomer. The UK is a single state but does not have a single legal system. Rather, it has

three: the legal systems of (1) England and Wales; (2) Scotland; and (3) Northern Ireland. These are three distinct legal systems, but they have many points in common, including laws that apply in more than one, or in all of these systems. It is the latter that generally comprises what people are referring to when they talk about UK law. Many other laws apply in only one of the three legal systems. There are even laws which apply only in Wales, even though Wales does not have a separate legal system.

All this was true before the devolution of political power to Scotland, Wales and Northern Ireland in 1999. The difference devolution has made is that, since 1999, there have been elected assemblies in Scotland, Wales and Northern Ireland empowered to make laws for those nations on certain policy topics. This is very important for Brexit. The elected assemblies were given powers to make laws on some topics governed by EU law. Brexit will remove the EU law constraints on the exercise of those law-making powers for the future. This raises the important constitutional question of whether, when powers on these topics are 'repatriated' from the EU to the UK, they should be exercised by the UK parliament or by the devolved assemblies.

In contrast to the EU, the UK has been slow to make clear its detailed negotiation positions. Back in February 2017, a broad outline of the government's vision was published in a [White Paper](#), but disclosure of more detailed positions on specific matters has only trickled out gradually. Even then, positions have already been altered and adapted. (See, for example, [the approach to the CJEU](#).) What we know so far and any developments will be published by the UK government's [Department for Exiting the European Union](#).

Regarding the transition UK law faces after leaving the EU, the 2017 [Queen's Speech](#) outlined a number of Bills. Of the 27, eight wholly concern measures around Brexit. These include the Immigration Bill, the Customs Bill, and the infamous (Great) Repeal Bill, or the [European Union \(Withdrawal\) Bill](#), to give it its proper title. Time will tell what these will entail and how they will progress through parliament. It is important to keep up to date with this as Brexit negotiations progress. You can find the Bills before parliament on its [website](#) and follow their progress by clicking on each respective one. This page also has the option of subscribing to email updates. If you need to brush up on the process a bill takes, the UK parliament website has made a [simplified video](#) and the government website provides a [more detailed outline](#).

In addition, each of the devolved nations' parliamentary bodies has a dedicated page linking to key information regarding Brexit and its effects on their national interests. It is worth keeping an eye on these given that [Scotland](#), [Wales](#) and [Northern Ireland](#) all face unique dilemmas when exiting the EU. One issue common to all the devolved nations, however, is that the statutes governing the devolution settlements in [Scotland](#), [Wales](#) and [Northern Ireland](#) all directly incorporate EU law. They will therefore require amendment as part of the UK's withdrawal from the EU and, to do this, the [Sewel Convention](#) dictates that the UK parliament will usually require the consent of the devolved legislature.

Further, many areas within the devolved nations' competences (e.g. agriculture and the environment) are currently covered by EU law. The question therefore arises as to where these repatriated powers will fall within the UK post-Brexit. The UK government's [White Paper](#) on exiting the EU emphasises the importance of ensuring

stability and certainty. It outlines an intention to discuss a way forward with the devolved administrations and to identify what 'common frameworks' need to be retained. Whether this means that such areas will be addressed by UK-wide frameworks or instead devolved nations' interests will prevail remains to be seen.

However, the UK government's preference became clear with the publication of the [European Union \(Withdrawal\) Bill](#) which was introduced into parliament on 13 July 2017. Clause 11 in effect freezes devolved competence on exit day by ensuring that the repatriation of powers from the EU flows, at least in the first instance, back to London (and not Belfast, Cardiff or Edinburgh) and does not result in any accrual of authority to the devolved legislatures, even in subject areas that are devolved. Some initial legal commentary on the Bill has been [offered](#), in addition to the immediate [political reaction](#) from Edinburgh and Cardiff.

There may well be more sources of UK law relevant to Brexit. For example, we might see challenges to interpretation, or Human Rights Act compliance, of the EU (Withdrawal) Bill and its impact on citizens' rights. Similarly, we might see litigation involving trade and commerce (e.g. involving property rights) in light of the Customs Bill. Whether case law will be fundamental to post-Brexit development will become clear with time. This is something to keep an eye on.

Finally, the unique challenges of Brexit might even necessitate the establishment of new bodies and, in turn, new sources of authority. For example, a new dispute resolution body may be established to handle disputes under the Withdrawal Agreement. Or, indeed, dependent on the direction of the negotiations, existing bodies' jurisdiction might extend to the UK (e.g. the [EFTA Court](#)).

## Secondary Sources

*Secondary sources* (anything that is not a primary legal text) can help enormously with understanding of primary legal sources. It is important, however, to exercise discretion when choosing which secondary sources to trust.

Some secondary sources, such as government guidance or interpretations of legal text, purport to be authoritative. While courts are likely to give these the utmost respect, they are ultimately not the law itself, and it is possible that they do not express what the legal text means. It is important to explicitly acknowledge this if you do refer to these sources, but they can provide a good platform from which to debate points of contention, to represent how vested interests impact upon interpretation, or simply to suggest what application of the law will look like in the absence of case law.

A couple of pertinent examples include the [Explanatory Notes](#) accompanying the EU (Withdrawal) Bill and a July 2017 National Audit Office [report](#) concerning HM Revenue and Customs' development of the new Customs Declaration Service. The former, written by the [Department for Exiting the EU](#) (DexEU), envisages the Bill's practical implementation, its impact on existing legislation, and hopes to inform its debate in parliament. The latter similarly considers future impact, but instead concerns a computer system.

When considering these sources for analysis, it is important to consider the organisations behind them and how this affects their reliability and legitimacy. Here, for example, a crucial difference is that the Explanatory Notes were created by a

government department while the report on the Customs Declaration Service was produced by an [independent body](#).

Our key focus here is on the *legal* aspects of Brexit. But law is not an isolated subject. It is not possible to understand legal implications without at least some attention to their social, economic, political, cultural or other contexts. At the same time, some sources, even apparently reputable sources, do not provide accurate statements of the legal position. Again, some discretion will be required to discern which sources are useful.

### ***Learning with Published Works***

These are some suggestions on books and journals with which you can start.

#### **Books on Brexit**

- Armstrong, K (2017) [Brexit Time: Leaving the EU: Why, How and When?](#) (Cambridge University Press)
- Dougan, M (ed) (2017) [The UK after Brexit](#) (Intersentia)
- Hassan, G and Gunson, R (eds) (2017) [Scotland, the UK and Brexit: A Guide to the Future](#) (Luath Press)

Printed texts may not be up to date, but the publisher may offer online updates (e.g. law books from [Oxford University Press](#)).

#### **Journals – Special Editions/Collections**

Look out for special editions on Brexit and Law of x (e.g. environmental, consumer protection, employment, health or trade law) in specialist law journals. All the general EU law and domestic law journals are covering the law of Brexit as it unfolds. Some examples:

- Craig, PP (2016) '[Brexit: A Drama in Six Acts](#)', *European Law Review*
- Kostakopoulou, D (2017) '[What Fractures Political Unions? Failed Federations, Brexit and the Importance of Political Commitment](#)', *European Law Review*
- [Edinburgh Law Review](#) – Forthcoming special edition on Brexit and Scotland

### ***Learning with Multi-media Resources***

#### **Academic and Professional Blogs**

With the uncertainty surrounding Brexit, any resources that have the capacity for fast publication are going to be particularly useful. In this respect, academic and professional blogs are fantastic – they can post swift reactions without the usual constraints of publication. To take full advantage of this, it is important to check the date of publication in relation to the events you are looking at. Timeliness is one of the assets of this source but inevitably it is also a weakness; particularly on a matter like Brexit, the relevance and accuracy of blogs can quickly diminish. This should also be borne in mind when looking at blogs linked to by other sources. Certain outlets might link to outdated sources in a new context in pursuit of a particular agenda.

Further, the ease of access that gives rise to the opportune nature of blogs means that it is crucial to identify **reputable blogs** as the internet gives a platform to

virtually anyone. This can be achieved by looking into who is the host of the website, or who the author of the piece is. For example, *university blogs* following developments in Europe include those from [LSE](#), [Durham](#) and [Edinburgh](#). In these cases, it is fairly self-evident that posts will be founded in academic research and opinion and therefore represent a reliable source. If you come across a site that you are unsure of, you might find that it has an *About Us* page that can give you further insight into what the motivations of the blog are, who runs it, and what angle it has taken. An example is that on [The UK in a Changing Europe](#).

It is advisable to be a bit more sceptical of *blogs by individuals*. This can again be resolved by some quick research. For example, if we take [EU Law Analysis](#), the equivalent About pages list the [blog contributors](#). Their credentials are given with their names, but a quick search will bring up the university profiles for the likes of [Steve Peers](#), [Jo Shaw](#), and [Catherine Barnard](#), confirming their reputations. While this will determine what is reliable, it is still important to distinguish between academic comment and analysis, and research: the former is persuasive while the latter is more authoritative.

Some useful examples:

### *Legal focus*

- [EU Law Analysis](#)
- [DELI Blog](#) (Durham European Law Institute)
- Many law firms' and chambers' websites have blogs and some have specific Brexit-oriented ones, such as [EUtopia Law](#) (Matrix Chambers) and [Inside Brexit](#) (Norton Rose Fulbright)

### *More general*

- [Ideas on Europe](#)
- [The UK in a Changing Europe](#)
- [EUROPP](#) (LSE)
- [European Futures](#) (University of Edinburgh)
- [Public Law for Everyone](#)

## **Hybrid/Non-Blog Resources**

Some digital resources are hybrids of journalism and blogs. For instance, [The Conversation](#) is written by academics and journalists in collaboration. It carries regular Brexit-related stories. Research centres, academic networks and think tanks can also provide valuable analysis. Examples include the [Centre on Constitutional Change](#), the [Scottish Centre on European Relations](#) and the [Scottish Universities Legal Network on Europe](#).

## Audiovisual

Short videos, podcasts and ‘talking heads’ have become a more commonly used method for imparting knowledge and understanding. Many of the same pieces of advice outlined above in relation to blogs – identifying reputable sources, being wary of outdatedness – also apply to relying on audiovisual sources. In general, audiovisual sources should be used as supplementary to other sources.

Some useful examples:

- [LSE Public Lectures – Podcasts and Videos](#)
- [Prof Michael Dougan’s Videos on Brexit](#)
- [SULNE Brexit Videos](#)
- [The UK in a Changing Europe – Multimedia resources](#)
- [Centre for European Reform – Podcasts](#)

## Twitter

Given the warnings of the previous sections, this recommendation that Twitter might be a resource to use might come as a surprise. The same approach should be taken to Twitter – but perhaps with even greater care. Follow only reputable accounts and be wary of taking replies to their tweets at face value. But do use it as a platform from which to conduct further research. Twitter live updates are useful and links to more detailed analyses can provide a good gateway to more information.

## Online (and Print) Media

Online and print media can again provide a useful gateway into topics you are researching. The reason for this is because they are aimed at a wide audience so they cannot presume knowledge in the same way as, for example, a journal. For this same reason, it is important to be wary of their output. Sometimes, simplifying information comes at the expense of accuracy.

Equally, the race to be the first to report has created the era of post-truth and fake news. Just because a reputable media outlet re-shares a story does not mean it is true. The BBC is one among many that has failed to fact check in the past. Be sure to look elsewhere at a variety of sources before relying on what you have read. Websites dedicated to [verifying](#) the truth of news stories can also be helpful.

## Wikipedia

Wikipedia should not feature in your bibliography, because of its nature as a source. But, when attempting to tackle a big area, it provides useful summaries on a whole host of topics. This can provide a helpful *starting point* for research.

## Designing Research Projects and Research Questions

For students who have an opportunity to write a dissertation or other independent piece of work, the pace of legal change, and the scale of the challenge of Brexit provides an opportunity to produce something original. It also provides a chance to produce a piece of work relevant to future career plans.

Originality is not usually a requirement of undergraduate, or postgraduate taught, work, but it is invariably one criterion used in assessment of that work. It might seem

risky to produce some work on a topic where there is not much (or any) literature. An example in Sheffield Law School in 2016-2017 was a dissertation on the legal position concerning blood and plasma supply on Brexit Day, in the event of a 'no deal' Brexit. There was literally no literature (of any sort) on this topic whatsoever at the time the dissertation was submitted. But if students are able to work with the primary legal texts, their legal skills will be rewarded.

When embarking on an extended piece of independent work, it is important to think carefully about **research design**. Remember that you are producing a piece of *legal* research. You need to think about what is a *legal* question, to which you can provide an answer.

It is also important to think about the **scope** of your project. Typically, dissertations allow you to deal in depth with one relatively narrow point, which you can put into its broader contexts to show its more general significance. So you might focus, for instance, on the continued rights to UK child benefit in divorced or separated families where one parent and the children are relying on EU citizenship law for their residence entitlements in an EU27 Member State. This very specific topic would give sufficient precision to ensure depth of legal analysis rather than superficiality. But it would also allow you to make more general points about the way EU citizens resident in an EU Member State of which they are not a national are being treated in the Brexit process.

Skills of legal analysis can be demonstrated through careful and considered interpretation of legal texts, especially where interpretation is disputed or disputable. As new legal texts appear during the Brexit process, they will be debated and scrutinised. What do the texts mean? Whose legal position do they affect, in what ways? Do the texts mean what their authors intend them to mean? Are there unforeseen and unintended consequences? Are there gaps in their scope? Does their scope extend wider than appropriate/intended? Thinking about the law in its various contexts, legal analysis may extend to highlighting the significance of what seems a dry or technical legal question. For instance, law in context analysis might explain: How many people would be affected, which people, and how they would be affected, by different legal interpretations of texts.

There is no reason why competent student projects cannot contribute to these wider processes and avenues of legal scrutiny and debate.



## Chapter 3

# The Vote to Leave the EU: Why Did It Happen and What Has Happened Since?

Daniel Kenealy *University of Edinburgh*

On 23 June 2016, voters in the UK opted to leave the EU by a margin of 51.9% to 48.1%. This chapter, offered as a contextualisation of the referendum, has three sections. The first looks at the road to 23 June 2016. The second considers the referendum campaign and, more importantly, the result itself. The third looks at events since the referendum and up to the triggering of Article 50 TEU by the UK government on 29 March 2017.

### The Road to the Referendum

Much like Anthony Eden and Suez, and Tony Blair and Iraq, the six year premiership of David Cameron is likely, historically, to be associated with one word: Brexit. To understand why Cameron ended up leading the UK into a referendum on its membership of the EU – and losing it – it is essential to understand political dynamics within the Conservative party in prior decades. Before discussing that, it must also be understood that the UK has always been something of an ‘awkward partner’ in the process of European integration.

The UK stood aside from the first steps towards integration, opting not to join the European Coal and Steel Community in 1951 and the European Economic Community (EEC) in 1957. Some years later, driven largely by economic struggles, the UK joined the EEC on 1 January 1973. In subsequent years, the UK remained detached from several major policy initiatives. It waited until 1990 to join the European Monetary System and negotiated opt-outs from the single currency (the euro), the Schengen Agreement and EU legislation in the Area of Freedom, Justice and Security.

Soon after joining in 1973, UK citizens were asked to decide whether they wished to remain. In a referendum on 5 June 1975 a substantial majority – 67.2% of participants – voted to remain. That referendum exposed fractures within the Labour party and, for much of the 1970s and 1980s, it was Labour for whom European integration proved most divisive. But it is within the Conservative party that the idea of leaving the EU has most firmly taken root since the late 1980s. By the 21st century, the debate about the UK’s relationship with the EU ‘was really [a family row](#), one raging in the Conservative party’. Party divisions on the issue had been a powerful contributing factor to the downfall of Margaret Thatcher in 1990 and posed a serious challenge to John Major’s government during the parliament of 1992-1997.

Thatcher shifted, over time, from her belief that the EEC could be an international vehicle through which she could spread and strengthen her free market, neoliberal ideas to a suspicion – and later an almost paranoia – that European integration represented a threat to the very notion of the nation state. Major was incapable of

preventing party divisions over the Maastricht Treaty. So small was his parliamentary majority that a small group of Eurosceptic MPs – whom he famously labelled ‘the bastards’ – were able to wield influence within the Conservative party disproportionate to their size. In 1994 Norman Lamont, Major’s former Chancellor of the Exchequer, became the first leading Conservative politician to publicly give voice to the possibility of the UK leaving the EU.

In opposition, during the Tony Blair-Gordon Brown years, the EU remained highly divisive amongst Conservatives although the issue failed to become a major priority for the electorate. After being elected party leader in December 2005, Cameron told his party to ‘stop banging on’ about Europe.<sup>1</sup> Nevertheless, the number of Eurosceptic MPs in the Conservative parliamentary party rose following the 2010 general election.<sup>2</sup> Cameron attempted to appease them, failing to realise that, for many of them, securing the UK’s exit from the EU was an article of faith.

He withdrew his party’s MEPs from the European People’s Party, the main centre-right grouping in the European Parliament, establishing a new group – the European Conservatives and Reformists – that saw Conservative MEPs caucusing with far-right Eastern European parties. After becoming Prime Minister, he passed the 2011 [European Union Act](#), committing the UK government to holding a referendum on any future treaty that transferred new powers to the EU. But the hard-line Eurosceptics in his party could not be appeased and, in fact, efforts to appease them simply served to embolden them as they sensed weakness and fear amongst the party leadership.

The hung parliament elected in 2010 led to a coalition government with the pro-EU Liberal Democrats. The EU issue did not go away within the Conservative party, but Cameron had a convenient excuse for why he could not offer a referendum. Beyond internal disagreements, many Conservative MPs – Cameron included – were concerned about the rise of the UK Independence Party (UKIP), a populist party that fused anti-immigration and anti-EU stances with calls for the UK to take back its sovereignty and control of its borders.

The EU issue was threatening Cameron’s party from within and without. The issue came to a head in January 2013 when Cameron finally conceded to the hard-liners in his party, [committing](#) to an in/out referendum. That referendum was to follow a renegotiation of the terms of the UK’s membership. At the time the commitment was made, it seemed unlikely that Cameron would lead a Conservative majority government after the 2015 general election. Events took an unexpected turn and in May 2015 Cameron secured a slim parliamentary majority, further empowering Eurosceptic MPs who were increasingly acting as a caucus within the parliamentary party. He had little choice but to press ahead with a referendum.

Cameron’s renegotiation of the UK’s EU membership [culminated](#) in February 2016. The concessions were fairly modest and, perhaps more importantly, were ‘[too complex](#)’ to be useful in the referendum campaign. They failed to shift the attitudes of many Eurosceptic Conservative MPs, 45% of whom [campaigned](#), against their prime minister, to leave the EU in the referendum that followed. Before considering

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<sup>1</sup> See D’Ancona, M (2013) [In It Together: The Inside Story of the Coalition Government](#) (Penguin) – Chapter 13

<sup>2</sup> See Heppell, T (2013) ‘[Cameron and Liberal Conservatism: Attitudes within the Parliamentary Conservative Party and Conservative Ministers](#)’, *British Journal of Politics & International Relations*, 15(3), 340-361

the referendum campaign and the result it is important to note that, beyond the difficulties that the EU posed for the Conservative party, UK society had never really warmed to European integration. Over [more than forty years](#) of membership, 'relatively few had taken the [EU] to heart and developed a strong sense of European identity. As a result, the country's position as a member ... was always open to challenge'.<sup>3</sup>

## Understanding the Result

A brief chapter does not allow for a comprehensive account of the referendum campaign. In broad terms the Remain campaign (*Stronger In*) focused on the economic risk and uncertainty of Brexit, attempting to emulate the successful campaign against independence in Scotland, which had been dubbed '[Project Fear](#)'. Doing so meant failing to put across a positive message about EU membership, despite some [evidence](#) that this might have been a more effective strategy.

In contrast, the Leave campaign settled on a simple slogan – 'Vote Leave, Take Control' – and managed to capture the narrative, threading together their messages about sovereignty and immigration, as the campaign entered its closing stages. The presence of political heavyweights such as Boris Johnson and Michael Gove in the *Vote Leave* team was undoubtedly helpful, adding gravitas and complementing the populism of UKIP's Nigel Farage who was closely involved in the parallel (though not the official) Leave campaign, *Leave.EU*.<sup>4</sup> The [media landscape](#) ought also to be noted briefly. Six of the nine main UK national newspapers supported leaving the EU, with coverage skewed towards Leave.

Early analysis of the result confirms, and nuances, the notion that citizens who have been '[left behind](#)' by economic changes associated with globalisation and a liberal policy consensus voted to leave the EU, in opposition to mainstream establishment actors. However, arguments about the economy, immigration, national identity, and sovereignty were all persuasive to different voters. As Curtice puts it: 'the way that people voted in the EU referendum was related both to what they thought the instrumental consequences of leaving would be and to their sense of identity. The outcome ... is best understood as the product of the interplay between both these forces'. Crucially, the referendum outcome was determined by a group of voters who felt that leaving the EU would 'not make much difference either way – and rather than splitting evenly between the two camps, only around one in three of them voted to Remain'.

It seems that, especially for economically disaffected voters, the Remain campaign's emphasis on economic risk failed to resonate. The referendum result also reveals deep social divisions within UK society. [Brexit supporters](#) held 'a more socially conservative outlook on Europe, immigration, and national identity that in recent years has become just as important as old disputes between labour and capital'. Figures reveal that age and education were two strong indicators of how people voted. The older you were, and the less formal education you possessed, the more likely you were to vote Leave. Curtice concludes that the country ended up 'divided

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<sup>3</sup> Curtice, J (2017) '[Why Leave Won the UK's EU Referendum](#)', *Journal of Common Market Studies*, 55(S1), p 16

<sup>4</sup> As Curtice, 'Why Leave Won', p 7, notes, polling 'persistently suggested that voters were more inclined to believe what [Boris] Johnson said about Brexit than they were the utterances of any other politician, including the Prime Minister'.

between its young well-educated professionals who felt relatively comfortable with EU membership and older, less well-educated voters who have been characterised as “left-behind” by some of the economic and social changes that have occurred around them’.<sup>5</sup>

## What Has Happened Since the Referendum?

The most immediate fallout from the referendum was Cameron’s resignation. Theresa May succeeded him and promptly handed some of the key ministerial positions involved in delivering Brexit to MPs who campaigned to leave (e.g. Boris Johnson became the new foreign secretary, David Davis was appointed as Brexit secretary). May set up new UK government departments – the Department for Exiting the European Union and the Department for International Trade – to handle Brexit. This has created issues within Whitehall as rival power bases emerge and the Prime Minister’s grip becomes looser. Within the civil service it had been expected that a minister would be appointed to handle Brexit but that the Cabinet Office – the central coordinating department in government – would manage it bureaucratically, keeping it within the prime minister’s sphere.<sup>6</sup>

May herself formally backed Remain but kept a low profile during the campaign. In her first months in office she offered ambiguity, refusing to say with any precision what her government’s vision of Brexit involved. At the Conservative conference in 2016 and in her [Lancaster House](#) speech in January 2017, she began to set out a vision for Brexit. The UK, she said, would leave the single market and probably the customs union, would ‘take back control of its immigration policy’, end the jurisdiction of the EU’s Court of Justice in the UK, and not stay in ‘bits of the EU’.

The terminology of ‘hard’ versus ‘soft’ Brexit has emerged in British political discourse to distinguish between Brexits that envision continued membership of the single market and/or customs union (*soft*) and Brexits that envision a sharp break with the EU, with perhaps no more than a Canada-style free trade agreement taking the place of membership (*hard*). Given the variety of possible outcomes, the simplistic terminology is less than useful. The vision set out by Theresa May is incompatible with so-called ‘softer’ forms of Brexit.

May’s stance is, in part, dictated by party politics. Like her predecessors, she heads a divided party. Hard-line Eurosceptics fear any attempt to water down Brexit by, for example, seeking UK membership of the European Economic Area (EEA) – alongside Norway, Lichtenstein and Iceland – that would allow for continued membership of the single market, or seeking to remain within the EU’s customs union, which would inhibit the UK’s ability to negotiate its own trade deals. Many Conservative MPs who voted to remain have not yet given up hope that a ‘soft’ form of Brexit might be achieved. The cabinet remains divided. A broad spectrum of opinion spans those who seek a clean break from the EU as soon as possible, to those who recognise the need for a long transition period and continued close economic cooperation.

May commenced the formal process of Brexit – triggering Article 50 of the Treaty on European Union – with a [letter](#) to the president of the European Council on 29 March

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<sup>5</sup> Curtice, ‘Why Leave Won’, quotes from pp 13, 14 and 16

<sup>6</sup> Interviews conducted by the author with senior civil servants in the Cabinet Office, Foreign Office and Department for Exiting the EU

2017, meaning the UK will leave the EU at the end of March 2019, barring a dramatic policy reversal by the UK government (debate continues about whether Article 50 is, in fact, reversible but, if the 27 other EU Member States accepted a reversal, then it is hard politically to see what the obstacle would be).

Following a calamitous general election campaign in 2017 – in which May gambled and lost her parliamentary majority and ended up surviving through a parliamentary deal with Northern Ireland’s Democratic Unionist Party – the prime minister is weakened and unable to offer the leadership necessary to bring together the disparate perspectives within her cabinet and her party. At the time of writing, it remains unclear precisely how the new parliamentary dynamics will impact Brexit, and indeed how long May will survive as prime minister. The UK civil service remains underprepared for the task of negotiating Brexit and is struggling with a lack of clear political direction from ministers. Senior officials on both sides – the UK and the EU – agree that a comprehensive Brexit cannot be negotiated and ratified by the end of March 2019 and that some form of transition deal will be required, perhaps spanning several years.<sup>7</sup>

Closer to home in Scotland – where 62% of those voting opted *not* to leave the EU – first minister Nicola Sturgeon has attempted to build support for a so-called ‘differentiated Brexit’. This would involve Scotland – and perhaps Wales and/or Northern Ireland – establishing relationships with the EU after Brexit that are different to those of England. Specifically, Sturgeon has [expressed](#) a preference for Scotland to remain within the single market – via membership of or affiliation to the EEA – and to receive sweeping new powers over immigration and the economy. Although such proposals seem [practically unworkable](#), it remains the case that Brexit presents a significant challenge to the UK’s already fragile political union, with especially acute problems in Northern Ireland which shares a land border with Ireland, a Member State of the EU.

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Understanding the path to the UK’s EU referendum in 2016 requires a familiarity with the internal dynamics of the Conservative party. David Cameron ultimately boxed himself into a corner and ended up having to fight a referendum that neither he, nor the country, had a particular appetite for. The referendum itself laid bare significant divisions within UK society, geographically and socially. Since 23 June 2016 a new government, and a new prime minister, have struggled to translate the wish of the UK public to leave the EU into a coherent policy vision.

An unnecessary general election in 2017 has left the UK with a weak government, led by a weak prime minister grappling with the same divisions that have characterised the Conservative party for three decades. With Article 50 triggered, the clock is ticking. Senior UK civil servants privately admit that the government lacks a clear plan and that there is not sufficient time before March 2019 to resolve all of the outstanding issues. One of the few things that are clear at the time of writing is that a referendum that was supposed to ‘settle’ the issue of the UK’s relationship to the EU has thrown the country into uncertainty, with no clear sense of just precisely where we are headed.

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<sup>7</sup> Interviews conducted by the author with senior civil servants in the Cabinet Office, Department for Exiting the EU, and officials in the European Council  
Chapter 3 | The Vote to Leave the EU: Why Did It Happen and What Has Happened Since?

## Further Reading

### For full explorations of the UK's troubled and awkward relationship with European integration

Milward, A (2002) *The United Kingdom and the European Community, Volume I: The Rise of a National Strategy, 1945-1963* (Routledge)

Wall, S (2012) *The Official History of Britain and the European Community, Volume II: From Rejection to Referendum, 1963-1975* (Routledge)

Grob-Fitzgibbon, B (2016) [Continental Drift: Britain and Europe from the End of Empire to the Rise of Euroscepticism](#) (Cambridge University Press)

### For a discussion of the Conservative party's troubles with the EU over the years

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Crowson, N (2007) *The Conservative Party and European Integration since 1945* (Routledge)

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Bale, T, Hanley, S and Szczerbiak, A (2010) '[May Contain Nuts? The Reality Behind the Rhetoric Surrounding the British Conservatives' New Group in the European Parliament](#)', *The Political Quarterly*, 81(1), 85-98

### On the rise of UKIP and the challenges it posed to established UK political parties

Ford, R and Goodwin, M (2014) [Revolt on the Right: Explaining Support for the Radical Right in Britain](#) (Routledge)

### Books focused on the campaign, published since the referendum

Bennett, O (2016) [The Brexit Club: The Inside Story of the Leave Campaign's Shock Victory](#) (Biteback)

Oliver, C (2016) [Unleashing Demons: The Inside Story of Brexit](#) (Hodden & Stoughton)

Shipman, T (2016) [All Out War: The Full Story of How Brexit Sank Britain's Political Class](#) (Harper Collins)

### Good long-read accounts

Behr, R (2016) '[How remain failed: the inside story of a doomed campaign](#)', *The Guardian*, 5 July

Cummings, D (2017) '[How the Brexit referendum was won](#)', *The Spectator*, 9 January

**For academic discussions of the referendum and its result**

Clarke, HD, Goodwin, M and Whiteley, P (2017) [\*Brexit: Why Britain Voted to Leave the European Union\*](#) (Cambridge University Press)

Goodwin, M and Heath, O (2016) '[The 2016 Referendum, Brexit and the Left Behind: An Aggregate-level Analysis of the Result](#)', *The Political Quarterly*, 87(3), 323-332

Curtice, J (2017) '[Why Leave Won the UK's EU Referendum](#)', *Journal of Common Market Studies*, 55(S1), 19-37

For a collection of academic articles exploring various aspects of Brexit, (2017) *British Journal of Politics & International Relations* [Volume 19, Issue 3](#)

**Useful digital resources for up-to-date coverage of Brexit**

- [The UK in a Changing Europe](#)
- [Scottish Centre on European Relations](#)
- [LSE Brexit Blog](#)
- [European Futures](#)

## Chapter 4

# Constitutional Law

Aileen McHarg *University of Strathclyde*

The impact of EU membership on the UK constitution has been profound. In the *Miller* (Article 50) case, the Supreme Court described the effect of the [European Communities Act 1972](#) (ECA) – the means by which EU membership was given effect within the UK – as being unprecedented in constitutional terms. Not only did it provide for a new source of law, and a new constitutional process for making law in the UK, it also fundamentally changed the UK's system of government and the way in which we think about the location and exercise of public power.

The key constitutional change was the shift from what was understood in 1972 (at least outside Northern Ireland) as a *unitary* constitutional order, with a single legislative body and single source of sovereign authority (the UK parliament) to a *multi-level* system in which governmental power is divided and shared between different geographical tiers. Not only did EU law act as a constraint upon the legislative competence of the UK parliament – and later also upon the devolved legislatures in Scotland, Wales and Northern Ireland – but the EU was itself a limited legal order, bound by its own constitutional framework as laid down in the treaties.

EU membership has therefore been a significant driver of the movement away from the UK's traditionally political constitution, in which democratic accountability was regarded as the major guarantee against abuse of governmental power, towards a more legally-constrained constitution, with a greater role for the courts as a check on public bodies. Its impact has been both direct and indirect. In direct terms, EU law itself has proved to be a fertile source of grounds of challenge to government action. Individuals and organisations who think that their rights under EU law have been breached by public bodies have been able to bring actions before the UK courts, often securing better remedies than would have been available under purely domestic law. Indirectly, the broader shifts in constitutional thinking engendered by EU membership – about the dividing and sharing of governmental power, and about the role of law in constraining the state – may have paved the way for later developments, such as devolution and the [Human Rights Act 1998](#) (HRA), which have also enhanced the constitutional role of the courts.

The most obvious constitutional impact of EU membership has been on the doctrine of parliamentary sovereignty. In the famous case of *R v Secretary of State for Transport ex p Factortame (No 2)* [1991] 1 AC 603, the House of Lords, for the first time since the Glorious Revolution, 'disapplied' an Act of the UK parliament so as to give priority to a directly effective principle of EU law. Constitutional scholars continue to argue about the basis for the *Factortame* decision, and the extent to which it modified the doctrine of parliamentary sovereignty. But there is no doubt that the ECA achieved what the orthodox (Diceyan) version of sovereignty said was impossible: the parliament of 1972 succeeded in binding its successor parliaments to give primacy to EU law (at least while the ECA remains on the statute book).

Moreover, the modification of the sovereignty rule has not been limited to compliance with EU law. Sir John Laws' rationalisation of the *Factortame* decision in *Thoburn v Sunderland CC* [2003] QB 151 introduced the idea that the domestic legal order



recognises a hierarchy of statutes. Whereas Dicey had famously claimed that the Acts of Union of 1706-1707 were of no greater legal authority than the Dentists Act 1878, it is now accepted that ‘constitutional statutes’ such as the ECA, but also the HRA, the devolution statutes, the Representation of the People Acts and so on, enjoy a special legal status which immunises them from implied repeal.<sup>8</sup>

However, the constitutional effects of EU membership are by no means limited to parliamentary sovereignty. Lord Denning’s famous metaphor of EU law being ‘like an incoming tide. It flows into the estuaries and up the rivers’<sup>9</sup> applies as much in relation to constitutional law as in other areas. General principles of EU law, such as proportionality, certainty, transparency and respect for fundamental rights, have influenced the way in which UK domestic courts approach the task of controlling public power, and have altered specific legal doctrines, such as eroding the privileges of the Crown in litigation<sup>10</sup> or imposing state liability for unlawful acts.<sup>11</sup>

As well as shifting the balance of power between the courts and parliament, EU membership has also affected the separation of powers between the executive and the legislature. In general, its effect has been to empower government ministers, who have an important law-making role in the EU via the Council of Ministers and [extensive powers](#) to implement European obligations via secondary legislation, at the expense of parliament. In addition, EU membership has been a conduit for the influence of constitutional ideas from our European neighbours – for instance, the requirement to use a system of proportional representation for [European Parliament elections](#) or the use of constitutional referendums as a means of checking further European integration.<sup>12</sup>

The overarching legal framework provided by EU law has also fulfilled certain constitutional functions which are less easily performed within the domestic legal order. In relation to devolution, for instance, EU law has acted as a centralising influence, counteracting the potentially disintegrative forces unleashed by the creation of sub-state legislatures. More specifically, in Northern Ireland, the UK and the Irish Republic’s common membership of the EU was one of the factors that facilitated the Good Friday Agreement, which ended 30 years of conflict by enabling the sharing of sovereignty across the Irish border without threatening Northern Ireland’s place within the UK. EU membership has also entrenched certain commitments, for instance to environmental protection, or gender equality, or the maintenance of open markets, which cannot be guaranteed in domestic law because of the doctrine of parliamentary sovereignty.

EU membership has thus had both deep and pervasive effects on the UK constitution, and leaving the EU will therefore amount to another fundamental constitutional change. Moreover, whereas the decision to join the EU was primarily motivated by economic considerations, the impetus for Brexit has been primarily constitutional – the desire to ‘take back control’, by restoring sovereignty to domestic institutions and breaking free of a set of supranational institutions that, as Theresa

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<sup>8</sup> See also *H v Lord Advocate* [2012] UKSC 24; 2012 SC (UKSC) 308; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3

<sup>9</sup> *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401 at 418

<sup>10</sup> *R v Secretary of State for Transport ex p Factortame (No 2)* [1991] 1 AC 603; *Miller & Bryce v Keeper of the Registers of Scotland* 1997 SLT 1000

<sup>11</sup> *Francovich v Italy* [1991] ECR I-5357, [1993] 2 CMLR 66

<sup>12</sup> See Referendum Act 1975; [European Union Act 2011](#), Pt 1; [European Union Referendum Act 2015](#)

May put it in her [Lancaster House speech](#) in January 2017, 'sit very uneasily in relation to our political history and way of life.' The [European Union \(Withdrawal\) Bill](#) will therefore repeal the ECA and related provisions in the devolution statutes, thereby ending the UK's domestic obligations to implement and comply with EU law, and will 'repatriate' decision-making competences currently exercised at EU level to the UK and (perhaps) devolved parliaments.

However, it would be a mistake to think that we can turn the constitutional clock back to 31 December 1972. The idea of constrained and divided constitutional power, which was such a novelty when the UK joined the EU, has since become the constitutional norm. For instance, the existence of devolved legislatures significantly complicates the process of withdrawing from the EU. Difficult issues as to the implications of Brexit for the [future division of competences](#) between the UK and devolved levels – and in relation to both Scotland and Northern Ireland (both of which voted to remain in the EU) – have reopened questions about the survival of the UK state. It also seems unlikely that the constitutional role of the courts will shrink back to what it was prior to joining the EU. One lasting legacy of EU membership is likely to be a permanently emboldened UK judiciary still willing to use at least some of the legal tools bequeathed to it by EU law to constrain the exercise of public power.

EU membership will also leave a lasting imprint on the UK constitutional order in the form of a new category of 'retained EU law', to be created by the domestication of currently directly effective or directly applicable EU laws via the EU (Withdrawal) Bill. These will continue to have a superior status to other domestic laws, as well as continue to bind the devolved legislatures, and could persist for years, if not decades, until they are finally replaced by domestic legislation. The precise implications of this new legal category are [complex and unclear](#), and are likely to create problems for lawyers, judges and government actors for a long time to come.

In other respects, however, the constitutional change brought about by Brexit may be greater. New or enlarged institutions may need to be created to carry out the governmental tasks currently performed at EU level, such as emissions trading or trade negotiations, and new capacities developed for scrutinising legislation and policy in these areas. Removing the obligation to comply with EU law may also create opportunities for greater policy and institutional experimentation than might otherwise have been possible – for instance a return to a significant role for public ownership or a reversal of the trend towards the creation of independent regulatory agencies.

On the other hand, international legal constraints (particularly international trade laws and any future UK-EU trade deal) are likely to take on a greater significance as a constraint on government action, and may require a constitutional response. Of immediate concern are the extensive proposed 'Henry VIII powers' conferred on ministers by the EU Withdrawal Bill to implement the EU withdrawal agreement and secure compliance with international obligations, which will allow them to make extensive changes to domestic law, subject to only limited parliamentary scrutiny.

In short, Brexit notwithstanding, lawyers will continue to have to grapple with the impact of EU membership on the UK's constitution, as well as with the reality, in an increasingly globalised world, of the need to share governmental power within and beyond the boundaries of the state.

## Further Reading

Armstrong, K (2017) [Brexit Time: Leaving the EU: Why, How and When?](#) (Cambridge University Press) – Especially Chapters 9, 10, 13 and 14

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## Chapter 5

# Free Movement of Goods

Andrew Farrer *University of Edinburgh*

The free movement of goods in the European Single Market is a foundational economic principle of the European Union. Considered together with the free movement of labour, services and capital, the free movement of goods is one of the four freedoms of the Single Market. The aim of a single market in goods was the creation of an economic space in which goods would move freely across borders without hindrance – the removal of all tariffs, customs checks and technical restrictions. The provisions for the free movement of goods apply not only to goods manufactured within the EU, but also to goods imported into the EU from third party states. Once inside the single market, imports are subject to the same rules as are applied to goods of EU origin.

The main treaty articles dealing with free movement of goods are: customs barriers ([Articles 28-30 TFEU](#)) and non-tariff and technical barriers ([Articles 34-36 TFEU](#)). The principles governing the operation of the free movement of goods can be summarised as: harmonisation, non-discrimination and mutual recognition. These principles underpin the substantive provisions on the free movement of goods in order to ensure that goods can circulate freely between the Member States.

The principle of *harmonisation*, [Article 26 TFEU](#), requires that the EU adopt legal measures designed to harmonise the functioning of the market and technical measures which bring domestic regulations and practice in the Member States into a greater degree of coordination. This harmonisation covers two principle areas; firstly, the requirements of health and safety, and secondly, product standardisation.

*Non-discrimination* is a fundamental constitutional rule of the EU and [Article 18 TFEU](#) states: ‘any discrimination on grounds of nationality shall be prohibited’. In effect, this provision requires that all goods produced in the Member States must be treated equally within the single market and may not be discriminated against on grounds of origin.

The principle of *mutual recognition*, or equivalence (which was famously established in the [Cassis de Dijon](#) case), provides that any product produced and marketed lawfully in one state may be marketed and sold in any other state, even if it does not conform fully to the technical standards of that state. This provision is subject to qualifications on the grounds of health and safety, consumer protection and so on.

### Articles 28-30 TFEU

Articles 28-30 address the abolition of customs duties and charges having an effect equivalent to that of a customs duty. The prohibition on customs duties and charges having *equivalent effect*, applies between Member States (Article 30), and between the Member States and third party states (Article 28). The establishment of the Customs Union and the prohibition on tariffs between Member States was an early aim of the Community.

The foundational [Van Gend en Loos](#) case in 1963 established the principle of the *direct effect* of Community law. At issue was whether the Netherlands government was entitled to increase a tariff on imports from Germany when such an increase was strictly prohibited by the treaty. The Court held that the treaty prohibited the Netherlands from imposing a tariff, and established the principle of the direct effect of Community law on the Member States and the rights of individual citizens to rely in their national courts upon Community law against the Member State in breach.

## Non-Tariff Barriers: Articles 34-36 TFEU

Non-tariff barriers are those measures that have an effect equivalent to that of tariff barriers, but do not involve a monetary charge or tax. Examples are quotas and the much broader category of technical restrictions which apply in each domestic market, known as *measures having equivalent effect to a quantitative restriction* (MEQRs). A quantitative restriction has the effect of restricting the movement of a good either partially or totally. The imposition by a state of a criminal penalty on trade in a given product would amount to a quantitative restriction (QRs). MEQRs are those measures imposed by Member States that are less obvious than QRs, but have a similarly restrictive effect on the movement of goods.

The key case in which the Court defined the formula to be applied is [Procureur du Roi v Dassonville](#); that formula being: '*All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions.*'

The effects of [Articles 34](#) (imports) and [Article 35](#) (exports) are extensive and cover a vast range of circumstances, including those where Member States wish to retain restrictions as a matter of policy. The treaty recognised the need to provide states with policy exceptions to Article 34 and 35, and [Article 36 TFEU](#) provides those exceptions. The list of allowable exceptions contained in Article 36 is a closed one – only matters covered by the contents of the article are considered permissible grounds for an exception to Articles 34 and 35. The list includes, *inter alia*, 'public morality, public policy or public security; the protection of health and life of humans, animals or plants'.

An example of a permissible exception under Article 36 would be a ban on imports of livestock or meat from a state suffering from disease in the agricultural sector such as foot and mouth disease or BSE. In addition, measures not protected by Article 36 exceptions may nonetheless be protected. In the landmark *Cassis de Dijon*, case the Court formulated the '*mandatory requirements*' doctrine. Mandatory requirements are obstacles to the free movement of goods that, according to the Court, are necessary to ensure, for example, the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions or the defence of the consumer.

The range of mandatory requirements acceptable to the Court is not limited and has expanded in the years since *Cassis* to include working conditions, protection of local or regional culture, protection of biodiversity and the exercise of fundamental rights. However, mandatory requirements can only be used to justify obstacles to the free movement of goods if they apply on a non-discriminatory basis to domestic and imported products.

## Brexit and Free Movement of Goods

The effect of EU free movement of goods in the UK has been to ensure that all products legally manufactured in other EU states, or legally imported into the EU and meeting EU requirements, may be sold in the UK. No tariffs are applied and non-tariff barriers – the technical standards which can vary between national industries – are managed through EU harmonisation and regulation. This open trading environment for manufactured goods has had a [significant and positive impact](#) on UK trade, although it should be said that, among the larger EU Member States, the UK has a [low level of economic reliance](#) on manufacturing and is therefore less vulnerable to changes in product markets than other major EU states such as Germany, Italy and France. The *Cassis* ruling and the market liberalisation facilitated by the [Single European Act](#) (1986) served to erode many non-tariff barriers to trade in manufactured goods between EU states.

The practical impact of the harmonisation of technical standards can be seen across the UK economy, but perhaps most clearly in the automotive industry. The interconnected nature of the European economy, modern transport and supply logistics allows the automotive sector in the UK to exploit the economies of scale now available across the EU single market. In the years prior to the completion of the single market, the UK automotive industry had been in something of a crisis – production was in decline and the industry was riven by industrial relations problems.

International car manufacturers, particularly Japanese firms such as Nissan, were encouraged after the Single European Act to see the UK as an ideal base within Europe for manufacturing operations. The UK offered a skilled workforce, good transport links and tariff- and customs-free access to the European market. The Japanese firms have been followed by German firms such as BMW, manufacturing the new Mini in the UK. The customs union and single market allow access to the entire EU market from a UK base without any tariff cost within the EU.

The contemporary automotive manufacturing process involves the transit of parts between several EU states in the process of manufacture. A good example of this cross-border process is the travels of a [BMW Mini crankshaft](#) between France, the UK and Germany, before final assembly in the UK. Car manufacturing logistics systems run to very tight schedules – in some instances, parts are scheduled to arrive for assembly as little as 15 minutes prior to being required. Any disruption to this free flow of parts and manufactures into and out of the UK will impact on the industry. The supply lines of manufacturers in the UK, highly integrated with the EU, depend upon the ‘frictionless’ movement of goods across borders as illustrated by the Mini crankshaft.

Negotiation of a post-Brexit free trade deal is likely to focus on avoiding tariff barriers, but more difficult and complex are the non-tariff barriers. Continued export into the EU without tariffs may be possible, but this will require continued cooperation on the elimination of non-tariff barriers, the harmonisation of legislation and standards to enable UK manufactures to be accepted in the EU. In addition, the customs union is an essential aspect of the current logistic system – any delays or blockages in the system due to customs checks will jeopardise [finely balanced](#) delivery and manufacturing schedules.

The UK government’s legislative mechanism for leaving the EU, the [European Union \(Withdrawal\) Bill](#), envisages the transfer of existing EU standards into UK law post-

Brexit. Difficulties will arise should the UK in future either fail to remain compliant with EU regulations or diverge from those regulations, as following them will be a requirement if the UK wishes to continue trading into the single market. Any political pressure to 'free' UK industry from EU standards or to remove from the UK statute book the imported EU regulations would create problems.

Manufacturers would not wish to make the same product to two different standards. This is the key to non-tariff barriers. On Day One after the UK leaves the EU, all of the existing EU standards will remain in play, but should parliament begin tinkering with the inheritance of EU law, or fail to ensure UK law remains harmonised with EU law, then difficulty will arise. It must be said that around 80% of EU product standards are voluntary, adopted by manufacturers in order to standardise across the single market.

The UK government interpreted the referendum result on 23 June 2016 as a mandate to negotiate Britain's exit from the EU, including the single market and the customs union. The government has indicated that it wishes to negotiate a free trade agreement with the EU to replace single market membership. In respect of free movement of goods, such a negotiation would imply reaching agreement across all of the product sectors presently covered by the single market.

Should the UK government fail to reach a comprehensive free trade agreement with the EU by March 2019, then two possibilities arise. First, the UK and EU agree an interim deal to operate until a complete deal is agreed. Such an interim deal may require the UK to retain present commitments to free movement of goods. The second possibility is that there is no comprehensive agreement and the UK leaves the EU without a free trade deal in place. In this circumstance, the EU and the UK would have to reach agreement under World Trade Organisation (WTO) rules. Under the WTO's *most favoured nation principle* (MFN principle), all members are obliged to offer the same terms of trade to all others. Applying the MFN principle to the automotive industry would mean that UK automotive exports to the EU would face the standard EU automotive tariff for third party states, currently 10%.

The most likely outcome is that the EU and the UK are able to reach a partial free trade agreement on manufactures and some agreement on customs. Any deal on customs will have to take account of harmonised standards. That is to say that the current EU standards applying to manufactured goods, and which apply in the UK, will have to prevail after Brexit in order for UK exports to be permitted access to EU markets. This may be partially addressed through the EU (Withdrawal) Bill, which proposes transposing current EU law in to UK law, thus preserving the current harmonisation of standards.

However, any such agreement will have to provide for the updating of standards, the UK accepting changes in EU standards and ensuring UK manufactures are compliant. More complex will be the status of goods imported into the UK post-Brexit from third party states, such as India, Brazil and the USA. The EU will require assurances that these products comply with EU standards and may demand customs checks on origin to be introduced. The EU will seek to protect any trade deal with, for example, Brazil, against the possibility of a deal between the UK and Brazil which undercuts or diverges from the EU deal.

## Conclusion

The high profile of and importance attached to manufacturing has led to considerable speculation on the post-Brexit position of UK manufacturing. It is probable that a deal with the EU on manufactured goods will be done. More complex will be the customs arrangements to protect supply chains and prevent the emergence of non-tariff barriers. Free movement of goods as it has operated in the UK during EU membership will no longer be possible, but something very similar may emerge. The short term needs of the manufacturing sector, in particular high-profile sectors such as automotive and aerospace, will most probably be met by the UK-EU deal. In the medium to long term, a complex series of agreements will be required in order to manage non-tariff barriers and to ensure that the UK is able to trade freely both with the EU and with third party states.

## Further Reading

Barnard, C and Peers, S (eds) (2017) [\*European Union Law\*](#) (2nd Edition, Oxford University Press) – Especially Chapters 12, *Free Movement of Goods* and 27, *Brexit*  
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UK Government (2014) [\*Review of the Balance of Competences between the UK and the EU – Single Market: Free Movement of Goods\*](#), February

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## Chapter 6

# Free Movement of Services and Freedom of Establishment

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The internal market consists of four economic freedoms (free movement of goods, services, persons and capital). This chapter considers the free movement of services, as well as the freedom of natural and legal persons to establish themselves in the territory of other Member States. It provides a brief overview of the general structure of EU law and its effects on the legal systems of the United Kingdom, as well as considering possible models which may be used to address the regulation of these aspects of the law in post-Brexit UK-EU relations.

Freedom to provide services and freedom of establishment are often regulated in tandem, since service providers may seek to establish a permanent presence in the Member State in which the service is provided. Establishment of an economic presence is contingent on being granted access to the services market. Consequently, there is significant overlap in the law and literature concerning these two freedoms, and this is likely to be reflected in negotiations concerning future UK-EU relations.

While EU law has had significant effects on the substantive law of the United Kingdom, this is not as pervasive as in the context of the free movement of goods, where product requirements are often standardised (see the [Free Movement of Goods](#) chapter). Regulation of services and establishment is especially evident in the [financial services](#) sector, where the laws of the UK have been amended to conform to harmonised standards, particularly concerning transparency and safeguards against abuse. Similarly, in the context of freedom of establishment, minimum standards have been introduced in [company law](#), for example, in order to ensure that creditors and other stakeholders are able to extend credit and contract on a cross-border basis with confidence, to safeguard employee participation in certain companies, to protect shareholder rights, and to facilitate and regulate corporate reorganisations.

These substantive changes are important and have had a transformative effect in some areas of legal practice, but perhaps the most significant change is to rules concerning the recognition of 'foreign' legal acts. The basic rule, as in all fundamental freedoms, is that that which is lawful in one Member State must be [recognised as lawful](#) in every other Member State, subject only to limited restrictions in the public interest. Accordingly, EU law requires the UK to recognise, for example, a company [established](#) under the laws of another Member State, or [qualifications](#) granted by institutions in other Member States. Equally, other member states are required to recognise that which is lawful in the UK, thereby facilitating the establishment of the United Kingdom as a [jurisdiction of choice](#) for corporate and financial services.

Brexit negotiations concerning freedom to provide services and freedom of establishment will therefore need to address both the substantive regulation of these

sectors, and the extent to which UK legal acts will be recognised in the European Union, and vice versa.

## Free Movement of Services

[Article 56 TFEU](#) provides that restrictions to freedom to provide services shall be prohibited within the European Union. This enables undertakings in the United Kingdom to provide services in other Member States of the European Union, and businesses and persons in the UK to receive services from other Member States. Article 56 TFEU is mirrored in the [European Economic Area \(EEA\) Agreement](#), as well as, albeit limitedly, [ad hoc agreements with Switzerland](#). Consequently, the freedom presently regulates the relationship between the UK, the 27 other members of the EU, as well as Norway, Iceland, Liechtenstein and, to an extent, Switzerland.

Services account for [two-thirds](#) of the EU economy, with non-financial services alone accounting for [32% of all UK exports](#). Accordingly, the treatment of trade in services will be an important aspect of the negotiations concerning future trade arrangements between the UK and the EU. Unlike trade in goods, international [trade in services](#) is not especially encumbered by tariffs. This does not mean, however, that trade is unrestricted. Restrictions to cross-border trade in services are usually of a technical nature. These include, in particular, rules which [restrict cross-border services](#) outright, or which do so as a consequence of divergent standards.

In order to address these barriers, the EU legislator has adopted common standards through positive harmonisation measures, while the Court of Justice of the European Union (CJEU) has delivered a number of judgments that curtail the ability of Member States to adopt restrictions which are unjustified in internal market law. The main legislative instrument is the [Services Directive](#) (2006/123/EC) which governs services generally. The Services Directive requires Member States to abolish restrictions and discriminatory practices. It also provides protections for consumers and other recipients of services. The net effect of the legislation and case law is a presumption that market access should not be curtailed, save if justified by the [Gebhard test](#).

The Services Directive does not address all services, but excludes sectors which required specific attention. There are therefore some specialised instruments addressing, for example, [insurance and financial services](#). Other sectors, such as cross-border gambling, have not been regulated through common legislation as agreement was not forthcoming. There are, however, judgments of the Court of Justice of the European Union, such as [Liga Portuguesa](#), which outline the extent to which restrictions may be justified in the internal market.

## Posted Workers

The provision of services on a cross-border basis results in the intermixing of national labour markets. Questions arise, then, as to which Member State is empowered to regulate employment relations for staff whose permanent employment base is outwith the state in which they are providing services from time to time. EU law has resolved many relevant questions through the [Posted Workers Directive](#) (96/71/EC), as well as a series of judgments of the CJEU, including that in [Viking](#).

Post-Brexit, however, it is not clear how posted workers will be treated as between the EU and the UK. The difficulty is partly attributable to the fact that, as a

consequence of the evolution of citizens' rights, the free movement of persons is subject to similar principles in EU law whether the freedom is exercised only for short-term provision of services or for more long-term employment. The matter is [further complicated](#) by the political import of freedom of movement of natural persons in the UK.

## Freedom of Establishment

[Article 49 TFEU](#) provides that obstacles to freedom of establishment shall be prohibited within the European Union. Freedom of establishment includes 'the right to take up and pursue activities as self-employed persons and to set up and manage undertakings'. Essentially, then, it means that the self-employed and legal persons are also entitled to establish an economic presence in Member States other than that of their nationality.

## Free Movement of Legal Persons

Companies and other legal persons established under the laws of any Member State of the EU must be [recognised](#) in other Member States. They may also, under certain conditions, [merge with entities](#) from other states, and thus reorganise their corporate architecture. Furthermore, legal persons established under the laws of one state may be transformed into entities organised under the laws of another member state. This allows a degree of flexibility in corporate organisation.

At present, the UK is the primary [jurisdiction of choice](#) of company law in the EU. This may be affected by Brexit in that – absented EU law obligations – some Member States may choose [not to recognise](#) a company established under UK company law, if they take the view that these companies should be organised under their own laws. This may occur where a company's headquarters is physically located in another Member State but is governed by UK laws for reasons of efficiency or convenience.

## Possible Models for Future UK-EU Trade Relations

International trade agreements between the EU and third countries include a number of potential models for an agreement concerning trade in services and establishment. To varying degrees, they use [three main tools](#) – namely, mutual recognition, negative integration and the adoption of common standards.

[Common standards](#) are deployed in the EEA Agreement because the internal market extends to EEA states. There is no overt requirement to adopt EU law in other trade agreements, although the Swiss legislator employs a system of so-called '[voluntary compliance](#)' with EU law in order to facilitate the close cooperation between Switzerland and the EU. The United Kingdom presently adheres to those common standards as a member of both the EU and EEA. The interpretation of agreed standards is entrusted primarily to the Court of Justice of the European Union. The EFTA Court is then required to interpret [EEA law](#) in accordance with the authoritative interpretation of EU law provided by the CJEU. UK government policy excludes membership of the EU or EEA, but it may be possible to adopt a principle of voluntary compliance, as is the case in Switzerland. This would establish an unenforceable obligation to adopt legislation which mirrors developments in EU law, thereby ensuring equal standards to facilitate mutual recognition and market access.

In the absence of common standards, mutual recognition is less easily attained. This is because, without agreement to adopt common minimum regulatory protections, it is far harder to presume that foreign standards are acceptable. Accordingly, the EU agreements with Canada and South Korea, for example, provide for the development of a [future framework](#) for mutual recognition, but do not include a default assumption that mutual recognition is part of the agreement.

Equally, the [General Agreement on Trade in Services](#) (GATS), a World Trade Organisation (WTO) agreement, does not presently include a [presumption](#) of mutual recognition, but provides a framework for further negotiation on the matter. In the case of the United Kingdom, mutual recognition would be relatively unproblematic from a legal perspective for as long as common standards are retained. Politically, however, it may be more difficult to secure mutual recognition without firm commitments to retain those common standards in future by having the laws of the United Kingdom shadow legal developments in the European Union.

In addition to the identification of suitable future long-term arrangements, UK-EU negotiations will likely account for transitional measures. By way of example, companies established under the laws of the United Kingdom are currently required to be recognised throughout the European Union. These UK companies may, in reality, be British only in that they are formally established under the [UK Companies Act 2006](#). In the absence of EU law, other Member States would not be required to recognise these companies since their residual private international law rules might provide that they should be established under laws with which they have a closer connection. It is arguable, however, that [legitimate expectations](#) have been established which would require the continued safeguarding of acquired rights in future. Negotiators will have to consider whether – and, if so, how – existing rights, lawfully acquired while the UK was a member of the EU, could be retained post-Brexit.

### Further Reading

Armour, J *et al* (2017) '[Brexit and Corporate Citizenship](#)', *European Business Organization Law Review*, 18(2), 225-249

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## Chapter 7

# Competition Law and Policy

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### Introduction

The UK's June 2016 referendum to leave the EU is expected to have material consequences for national competition law. The exact shape the UK competition regime will take is subject to various factors – which will likely be clarified both before and after the UK's exit, currently scheduled for the end of March 2019.

Competition law concerns intervention in a market where there is 'market failure': either through the action of a monopolist, an anti-competitive agreement, or through a merger. The purpose of competition laws is to protect competition and to deal with market imperfections arising in a free market economy (e.g. where firms collude to keep prices artificially low or high).

According to the [European Commission](#), the goal of competition law is 'to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.' In order for the EU to maintain a functioning single market, it was seen as necessary to introduce a number of provisions in the field of competition law in the original Treaty of Rome and in subsequent treaties. The main provisions can be found in [Article 101 TFEU](#) and [Article 102 TFEU](#). Article 101 prohibits restrictive agreements between undertakings, while Article 102 prohibits any abuse by one or more undertakings of a dominant position held within a substantial part of the internal market, in so far as it may affect trade between Member States.

There are also rules prohibiting state aid ([Article 106 TFEU](#)) and rules which control mergers of undertakings ([Regulation 139/2004](#)). The primary UK domestic competition law rules are the [Competition Act 1998](#), Chapter 1 and 2 prohibitions, modelled directly on Articles 101 and 102 TFEU and with a requirement under s60 of the act for them to be interpreted consistently with EU jurisprudence on Articles 101 and 102.

Articles 101 and 102 both apply to 'undertakings', which the Court of Justice has defined in Case C-41/90 [Höfner](#) broadly as encompassing 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.' Entities include natural persons, legal persons and even states. To fall within the scope of Articles 101 and 102, agreements or conduct by undertakings must have a minimum level of cross-border effects on trade between Member States. The Court clarified in Case C-238/05 [Asnef-Equifax](#) that this means that it must be possible to foresee with a 'sufficient degree of probability, ..., that [such agreements or conduct] have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States.'

There are a number of exclusions from Articles 101 and 102 TFEU, which can be found in certain Treaty provisions (e.g. [Article 346\(1\)\(b\) TFEU](#)), the case law of the

Court (see Case C-67/96 [Albany](#), where it was held that collective agreements between trade unions and employers were not subject to competition rules) or EU regulations. The case law of the Court has played a hugely significant role in putting flesh on the bones of Articles 101 and 102. Most widely known is perhaps [the case against Microsoft](#) which resulted in record fines being imposed.

Competition law is currently regulated and enforced at both EU and national Member State level by a network of competition authorities ([European Competition Network](#) – ECN), comprised of the European Commission and the national competition authorities (NCAs) of the Member States (in the UK, this is the Competition and Markets Authority – CMA), as well as by private litigants through civil courts. The choice of which regulator (UK or EU) takes ownership of a case is usually dependent on the size of a transaction and the relevant Member States with turnover for [mergers](#) (i.e. corporate acquisitions), and where the effects of certain anti-competitive behaviour will be felt. For the latter, examples include [cartels](#) (i.e. anti-competitive arrangements between competitors), [abuse of dominance](#) (i.e. an undertaking with significant market power taking advantage of competitors on the market, to the detriment of consumers), and the regulation of illegal [state aid](#) (i.e. a form of government subsidies which have not been given approval, and which are anti-competitive).

Much of UK competition is harmonised with EU competition law: The UK's CMA is currently subject to the '[governing principle](#)' under UK competition law, according to which it must follow EU level competition decisions and precedent for anti-competitive agreements, and abuse of dominance. The European Commission similarly holds enforcement jurisdiction in the UK, including its *power of pre-emption*, which allows it to adopt a case over the CMA under [Regulation 1/2003](#) – the Modernisation Regulation, which aims to attain greater competition convergence at national level. The CMA is also part of the European Competition Network, through which it benefits from integrated cooperation with other EU competition regulators, including the exchange of information, re-allocation of cases, and coordination of dawn-raids. The review of EU level mergers is currently subject to the *one-stop-shop* filing mechanism with DG Competition under the [EU Merger Regulation](#).

The CMA has therefore benefitted from invaluable guidance from the EU, and in particular DG Competition, which has been dealing directly with resource intensive cases, such as the recent EU [Google](#) abuse infringement decision (and record fine) which took over seven years to conclude. For [cartels](#), DG Competition has taken the lead on investigating pan-European anti-competitive arrangements, raiding and otherwise manning large-scale cartel cases, and ultimately imposing infringement decisions and significant fines.

From a [merger](#) control perspective, the EU Merger Regulation imposes an EU level compulsory filing mechanism for mergers when the EU thresholds are met – providing a streamlined procedure for both merging parties, and in doing so has taken the bigger and more complex cases off the desks of the CMA. Regarding [state aid](#), Europe has fully-fledged state aid review mechanisms in place at an EU level, and DG Competition has been actively investigating multinational corporations – like Starbucks in the UK – benefitting from selective tax advantages, ultimately demanding significant sums to be repaid.

## **Brexit: What Are the Immediate Consequences?**

From a practical perspective, if the UK leaves the single market (a 'hard' Brexit), it will be imperative that cut-off dates are agreed and established as regards the ownership of a case by DG Competition or the CMA. Ownership might depend on which competition regulator initiated the investigation or merger proceedings, or whether the relevant behaviour occurred pre- or post-Brexit, or straddled Brexit Day. While important to allow merging parties to know where to notify their merger, clarity is also vital for longer-standing investigations. Workable mechanisms will also be needed for leniency applications and the monitoring of behavioural commitments. Concerning merger control, it will be particularly important to determine the ownership of cases that are mid-review at the time that Brexit takes effect.

Looking to the established guidance provided by the EU [Competition Block Exemptions and Guidelines](#), which essentially provide legal 'safe harbours' for companies to self-assess strictly defined arrangements in distribution, R&D and Tech – a practical solution could be to retain the same rules under UK law for now. This should provide companies with legal certainty that their EU-compliant agreements will continue to be UK-compliant. Further, an agreement on parties' rights of appeal, and the appropriately recognised court for the case – whether a European or UK court – will also need to be hammered out to protect parties' procedural entitlements and legal certainty.

It is likely that the CMA will initially suffer from a significantly increased workload, and as a result will swiftly need to increase staff numbers significantly, and potentially even streamline its decision-making processes to make efficiency gains. The CMA will need to ensure that the merger control directorate is sufficiently manned with experienced staff to deal with the expected immediate upsurge in merger notifications (including more complex and larger deals) while retaining enough staff in the enforcement directorate to sufficiently investigate and punish behavioural infringements.

If the CMA is no longer part of the European Competition Network, then it will also lose access to EU-wide information sharing mechanisms. The ECN is a significant strength of the EU competition regime, and will represent loss both regarding co-ordination of cases and intelligence (unless another co-operative solution is agreed). A 'hard' Brexit will also have an impact on solicitors involved in competition law cases. Undertakings must continue to be assured of their lawyers' cross-jurisdictional legal professional privilege, which could negatively affect UK-qualified lawyers post-Brexit, since they may not be recognised within the EU system.

Finally, there is some danger that dual systems of enforcement could quickly emerge across aspects of competition law vis-à-vis the UK and the EU, which would pose a problem for businesses active in the UK and Europe, having to comply with differing rules and procedures. Similarly, an increased risk of double jeopardy may arise for pan EU-UK cartellists, as a result of potentially double investigations and increased total fines.

## **Options for the Future**

Going forward, it is likely that we will see further movement towards bilateral and multilateral cooperation mechanisms. Reaching potential multilateral arrangements with groups such as the EU and ASEAN (the Association of Southeast Asian

Nations) competition regulators may represent one approach, in addition to bilateral deals with other individual leading competition regulators, such as those in the US and Australia.

In line with a more streamlined process within the CMA, different procedures and rules may develop over time. From a merger control perspective, this could realistically involve an increase of the UK merger filing thresholds, to cut down on the number of filings made to the CMA, while retaining its voluntary filing system. The recently increased *de minimis* market threshold could also be further raised in a bid to exclude further minor cases from the CMA's ambit.

As for cartels, the above multilateral and bilateral arrangements should ultimately aim to reward the CMA with an enlarged form of cooperation between competition authorities, ideally incorporating investigations, and the ability to exchange information with each other (although it would likely not encapsulate the close-knit efficiency of the current ECN model). Cooperation will continue to be important given the fact that while EU competition law will not apply in the UK, it will still apply to UK companies whose agreements and conduct affect EU markets, and the same is true for the application of UK competition law to EU companies.

Looking to the UK's previous notification and exemption system for certain types of agreements between competitors and non-competitors, the CMA may consider reintroducing a new and improved voluntary notification system. This could represent a potential benefit, given the national regulator's traditionally strict approach to the enforcement of vertical restrictions like resale-price-maintenance – namely, imposing a re-sale price to be sold at down the supply chain (which DG Competition has not had much involvement with until very recently in the context of the [e-Commerce Inquiry](#)).

A combination of a purely voluntary notification system, with a reasonable fee per notification, would provide parties who wished for confirmation with the possibility of obtaining legal certainty in a post-Brexit UK, at a non-prohibitive cost, while ensuring the CMA is given the means to fund such a mechanism. In such circumstances, UK laws would ideally need to remain either stricter than, or close enough to the position in EU competition law, to avoid issues nevertheless being examined by DG Competition.

Unattached to EU competition restraints, the CMA could also significantly increase its ability to enforce the UK competition regime going forward by unilaterally amending the fine calculation mechanisms to increase fines for behavioural infringements, and at the same time enhance its criminal cartel regime. Such measures could, in turn, result in an extremely deterrent and effective regime. An increase in fines (and filing fees) could in turn help the regulator to fund likely needed increases in staff levels to deal with the enlarged caseload which it will inevitably face.

One potential concern is whether a hard Brexit will encourage the UK to introduce a more politicised competition system in the longer term – for instance, where the application of the public interest test in merger control may be widened past its current ambit. This also brings up the question as to whether the UK would have the opportunity to support specific industries by awarding subsidies without checks.



Thanks to, among other factors, reliable, efficient courts and relatively generous and flexible rules on the discovery of evidence, the UK has also become something of a magnet for competition damages claims, with clear benefits for the UK legal services' industry. Instrumental to this degree of success is the possibility for claimants to rely on the well-established rules provided by the [Brussels Regulation](#) (see the [EU Private International Law](#) chapter), in respect to both the establishment of jurisdiction and the recognition of judgments within the EU. The advantages of the current jurisdictional regime are especially visible in respect of multi-defendant cartel cases where claimants have been able to 'concentrate' a potentially significant number of claims before one forum, thereby avoiding parallel proceedings and inconsistent adjudication.

Brexit stands to change all of this by making the rules of the Brussels Regulation no longer applicable, with clear drawbacks for competition law litigants. Will English courts be able, once again, to rely on the *forum non conveniens* doctrine to decline jurisdiction in favour of another court where the same case may be 'justly tried'? It could be argued that returning to this doctrine may be a way for English courts to 'regain control' over the scope of their adjudicatory powers, thereby remaining consistent with one of the key tenets of the Brexit campaign. However, it would also come at a high cost for litigants and for the UK legal services' industry.

In respect of the mutual recognition of judgments, it has been suggested that courts in other Member States could continue to be 'willing' to recognise and enforce UK judgments. Nonetheless, it may be foreseen that the 'simplified' procedure enshrined in the Brussels Regulation would become inapplicable and therefore this issue would be governed by the law in force in the Member State where a victorious party seeks to enforce these judicial decisions, thus adding complexity, length and costs.

Can the exit from the EU be managed in a way that minimises some of these risks? Could the UK parliament, for instance, unilaterally legislate to introduce rules that reproduce the status quo? What about 'old international instruments' that, up to the UK's accession to the EEC, had allowed for a degree of mutual recognition of judgments and of judicial cooperation on jurisdictional matters? It has been suggested that agreements such as the [Lugano](#) or [Rome](#) Conventions could usefully be 'resurrected', since they had been regulating these issues until the Brussels Convention was stipulated. Nonetheless, this outcome appears very uncertain, since the EU Court of Justice could take the view that the process leading to the Brussels regime, of which these instruments could be regarded as being necessary steps, may be a 'one-way street'.

It is acknowledged that, come the actual withdrawal of the UK from the EU, greater clarity should have been achieved as regards this and other issues arising from the event. Nevertheless, it is to be expected that until such time as practical arrangements are in place, litigants, courts and legal services providers will be exposed to significant uncertainty and potentially to a downgrading of their access to justice rights.

### **What Does Brexit Mean for Scotland?**

A further aspect that merits a short discussion is what impact the UK's exit from the EU will have for the competence in competition policy that has been conferred to the Scottish government through the [Scotland Act 2016](#), as a result of the debate engendered by the Smith Commission. According to Section 63 of the act, which

amended Section 132(5) of the [Enterprise Act 2002](#), the Scottish ministers enjoy the power to ask a member of the UK government to make a reference to the CMA if they are either dissatisfied with the CMA's decision not to make a reference or is 'satisfied that the CMA is aware of whatever evidence has led the "appropriate Minister" to form a suspicion and is not likely to reach a decision as to whether or not to launch a market study (to determine whether a reference is appropriate) within a reasonable period of time'. Thus, this power is to be exercised jointly by the competent ministers sitting in, respectively, the Scottish and the UK governments.

After Brexit, as the CMA will acquire a far more burdensome case log, due to the intervening lack of the European Commission as a 'central', EU-wide enforcer and to the inability to rely on the existing cooperation framework provided by the ECN, it could be legitimately questioned whether making a case for the CMA to investigate a 'Scottish case' may become harder. Further issues are likely to arise in respect of merger control. As was illustrated earlier, Brexit could lead to more frequent recourse to the 'public interest exception', thus allowing UK ministers to intervene in the scrutiny of individual transactions. However, this is not an avenue that is open to Scottish ministers in respect of concentrations having a projected impact on Scottish markets, thus complicating, even more, the already foggy approach to the competition policy competence that they enjoy jointly with UK ministers.

The intervening lack of a system for the scrutiny of state aid may also potentially jeopardise the effectiveness of devolution – albeit to the admittedly limited degree achieved in 2016 – in this area. It will not be possible for the Scottish authorities to assess (either directly, due to the limitations of Section 132 of the Enterprise Act, or through the intervention of another agency) whether financial intervention by the UK government could have anti-competitive effects in Scottish markets.

## Further Reading

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## Chapter 8

# Free Movement of Persons and EU Citizenship

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The free movement of persons, along with the free of movement of goods, capital and services, comprise the four fundamental freedoms of the EU Single Market. The right of free movement began as free movement for workers ([Articles 45-48 TFEU](#)), self-employed persons ([Articles 49-55 TFEU](#)), or providers or receivers of services ([Articles 56-62 TFEU](#)). This economic core of the right to movement pertains today and workers' rights are supplemented by EU secondary legislation – for instance [Regulation 492/2011](#), which guarantees host state nationals and their family members the right to enjoy work, working conditions, access to housing and education on an equal footing with home state nationals.

The EU has also made significant efforts to create an environment conducive to worker mobility, including for instance by coordinating social security schemes across the EU (see [Regulation 883/2004](#)). The right to free movement for these economically active natural persons also applies to nationals of the EEA states (Norway, Liechtenstein, and Iceland).

Since the [Maastricht Treaty](#) (1993), all nationals of an EU Member State are also European Union citizens ([Article 20 TFEU](#)) with rights to move and reside freely in the EU subject to the limits laid down by EU law. For those who are not 'economically active', this status appeared to offer them potential for greater protection under EU law than they had enjoyed previously. The case law of the CJEU has been particularly interesting and, although over time it has adopted a generally expansive and 'rights-enhancing' interpretation of EU citizenship, it has more recently adopted a more restrictive approach, enabling host states to prevent non-economically active EU citizens from claiming social benefits (see for instance Case C-333/13 [Dano](#)). For those who are economically active, the citizenship provisions have not added much to their EU rights.

For all EU citizens moving to another Member State, the key piece of legislation outlining the scope of rights is, since 2004, [Directive 2004/38/EC](#), also known as the 'Citizens' Rights Directive' or 'Free Movement Directive' (although note that EU citizen migrant *workers* would also receive the additional benefits outlined in [Regulation 492/2011](#).)

The Citizens' Rights Directive sets out that free movement and residence can be enjoyed, in effect unconditionally, in another Member State for a period of up to three months – the only trade-off being that the host Member State can restrict access to state benefits during this time. To enjoy residence in another Member State beyond three months, persons must be a national of a Member State (nationality is a matter for Member State's own law), and be either a worker, a self-employed person, an economically self-sufficient person (with health insurance cover – this category, for example, enables retired people to enjoy free movement), a student (with health

insurance cover and sufficient resources to support themselves), or a jobseeker who has a genuine chance of being engaged (with some limits to equal treatment in terms of access to social assistance until they become employed). Overall, these categories demonstrate that rights of free movement and residence are focused primarily on those who are economically active or economically self-sufficient.

If an EU citizen meets these qualifying criteria, they enjoy a range of rights including rights: to enter, reside, leave; to protect them from expulsion; to work, including the coordination of social security; to bring certain family members; to equal treatment on the basis of nationality; and, finally, to accrue 'permanent residence' status in the host Member State after five years of lawful residence.

EU law does permit a Member State to derogate from the treaty freedoms on specific grounds – public policy, public security or public health ([Article 45\(3\) TFEU](#) and [Article 52 TFEU](#) and Chapter VI, Citizen's Rights Directive). A few specific exceptions to the principle of non-discrimination on grounds of nationality also apply – for instance, in relation to access to jobs and professions that require specific linguistic capability (Article 3, Regulation 492/2011) or are in the public service ([Article 45\(4\) TFEU](#)). However, exceptions to individual's rights on public policy, security and health grounds have been interpreted narrowly by the CJEU. Extensive procedural safeguards are provided for parties seeking to assert EU law-derived rights and a stricter test applies to the application of derogations in relation to minors, those who have a right of permanent residence or those who have ten years' residence.

### **Brexit – What is at Stake?**

At the time of writing, the Brexit negotiations between the EU and the UK are under way but the final terms of Brexit are still unknown. The UK government has [indicated](#) that taking back control of UK borders and immigration is central to a Brexit deal. It has confirmed its intention to exit from the single market which signals the end of free movement of persons rights, at least in their current form.

Immigration was undoubtedly the most sensitive issue in the period leading up to the referendum and it remains so following the vote to leave. For some, leaving the EU and the single market (of which free movement of persons is a central plank) is the only way to 'take back control' of the UK's borders. Migrant EU citizens, are accused of being 'welfare tourists', putting the UK's benefits system under undue pressure, and at the same time are blamed for taking up jobs and undercutting national wage rates. However, [research](#) suggests otherwise. Evidence indicates that the principal driver for migration of EU citizens to the UK is [work](#).

Research on the [impact of EU immigration](#) to the UK has detected no negative effects on the average wages of UK-born workers and in fact shows that EU immigrants have contributed positively to the UK's fiscal budget – putting in more by way of taxes than they receive in benefits. This is perhaps not surprising given that, on average, incoming EU citizens are younger, more likely to be in work and less likely to be on benefits than UK citizens. The UK government's position looks rather odd in light of this research. It announced in July 2017 that it was [commissioning](#) the independent Migration Advisory Committee to carry out a detailed analysis of the economic and social contributions and costs of EU citizens in the UK. Quite how it will react to the findings is unclear.

What is undisputed is that EU law is currently a hugely important source of rights for significant numbers of people – enabling them to carry on their lives in a particular way. There are an estimated three million EU nationals living in the UK. And of course, free movement rights are not limited to EU citizens living in the UK. It is thought that there are over one million UK nationals living in other EU Member States, based on EU law.

It is perhaps no surprise then that the question of what happens to UK citizens in the EU and EU citizens in UK after Brexit, is a matter of absolute priority for both sides as [withdrawal negotiations](#) begin. The need to avoid disruption in people's lives as EU law disappears as a direct source of rights in the UK on Brexit day is paramount – and the UK government will also be acutely aware that data on the economy shows, that without inward EU migration, the UK may face [labour shortages](#) – certainly within sectors of the economy with a large presence of EU migrant workers.

With this in mind, it had been [suggested](#) that, in implementing a new scheme for immigration of EU/EEA citizens into the UK, the UK government should enable free movement rights to continue in a limited way – such as only to those who already have secured jobs. While we see no hint that this is the preferred approach of the UK government at the time of writing, we do see an expressed desire to give the rights of EU citizens and their families, who are exercising EU rights at the time of a specified Brexit cut-off date, a special status in UK law.

The devil will most certainly be in the detail. As has been shown above, the free movement of persons framework includes far more than simply the right to reside and work. It covers entitlements to benefits and pensions, rights of access to public services, rights to run a business, as well as the ability to be joined by family members and extended family members (including family members who are not themselves EU citizens), and it includes the ability to accrue or acquire rights – ultimately the right of 'permanent residence' following a period of five years' lawful residence.

It will need to be addressed whether such accrual of rights will still be possible for EU citizens who are resident in the UK at an agreed cut-off date and, whether their family members may also continue to accrue their rights, including the children and future children of EU citizens. It will also be important – but extremely challenging - to devise a system that enables people who will have rights 'on paper' to be able to effectively access them.

## Negotiating Positions of the UK and EU

The European Council announced that the first priority of the negotiations would be to agree guarantees to safeguard the status and rights derived from EU law of EU citizens and their families affected by the UK's withdrawal from the Union. The [EU's position](#) was published in a position paper on 12 June 2017 and the [UK's position](#) was published in response on 26 June 2017. The stated objective of the UK Government's position is 'to ensure continuity in the immigration status of EU citizens and their family members resident in the UK before [the UK's] departure from the EU (including their ability to access benefits and services)' (Para 15). The details of whatever will replace EU free movement law will be laid out in due course

in an Immigration Bill, one of a [whole raft](#) of UK legislation anticipated to deal with Brexit.

At the time of writing, as negotiations are beginning, there is some distance between the first stated positions of the EU and the UK. Both sides emphasise the need for a 'reciprocal' deal, so that whatever guarantees are put in place to secure the rights of EU citizens resident in the UK, equivalent guarantees are in place for UK nationals in the EU.

The EU insists on the automatic and same level of protection, as set out in EU law at the date of withdrawal, of EU27 citizens in the UK and of UK nationals in EU27, *including* the right to change status and to accumulate periods leading to rights pursuant to Union law during the period of protection of the withdrawal agreement. For instance, a student can still become an 'EU worker' after completing their studies without having to comply with domestic immigration rules applicable to third-country nationals; and a person who has resided legally in the UK for less than five years by the date of the entry into force of the withdrawal agreement can continue to accumulate the necessary five years' residence, giving access to permanent residence rights.

The UK's position is less generous. It promises to create new rights in UK law for *qualifying* EU citizens resident in the country on a cut-off date (which would be subject to discussion, but no earlier than the triggering of Article 50 TEU and no later than Brexit Day (currently anticipated as 29 March 2019)). Therefore, from that date, the right of EU citizens to live, work and continue to enjoy economic and other rights in the UK *would not be automatic*. Instead, an application – promised to be 'user-friendly and streamlined' – would have to be made to the Home Office to attain 'settled status', which would grant its beneficiaries rights (to work, benefits, pensions, healthcare) that are identical to those of UK nationals.

Settled status would be open to any EU citizen who has been living in the UK for five years at the time of the cut-off date, and EU citizens with fewer than five years residence on that date will be given time (how long is unclear) to stay until they have the five years of residence to obtain settled status. Although not mentioned, for those who do not or cannot acquire settled status, they will presumably be deemed to be in the UK illegally and therefore subject to rules on deportation and removal.

According to the current UK position, EU citizens would be deprived of their right to bring [future family members](#) in the UK under the conditions that they enjoy currently. This is a significant change in their position, as rules imposing income tests and language requirements as per current UK immigration law would apply.

Another significant clash relates to the appropriate framework of legal enforcement, with Brussels insisting that the rights be upheld by the EU Court, while the UK position insists that 'those rights will be enforceable in the UK legal system and will provide legal guarantees for these EU citizens.... [t]he Court of Justice of the European Union (CJEU) will not have jurisdiction in the UK.' This matter is a political hot potato but will need to be resolved, mindful of the need to ensure reciprocity of rights and clear avenues of access to justice.

As the status of EU citizens in the UK is one of the issues on which 'sufficient progress' must be made for Brexit negotiations to proceed to the next phase, more clarity and compromise should be expected to emerge before too long. What seems

to be emerging is the direction of travel the UK intends to take, which includes ending the more generous rights-based regime and bringing EU citizens and their family members within the much more restrictive, permission-based immigration regime.

## Scotland

Immigration is currently a matter reserved to Westminster in the devolution settlement, and therefore, formally, Edinburgh would not have legal authority in relation to the entry and residence rights of EU citizens into the UK post-Brexit. The picture is more nuanced when one considers that devolved powers exist in relation to matters that will affect the lives of most EU citizens resident in Scotland (education, healthcare), and when one considers the particular importance of EU free movement to sectors of the Scottish economy and the demographic challenge of a declining population facing parts of Scotland.

The House of Lords July 2017 [Report on Brexit and Devolution](#) acknowledged that 'views on EU migration vary widely across the UK, and the reliance upon EU workers, both to satisfy the needs of the labour market and to cope with demographic change, is particularly acute in the devolved nations.' Against this backdrop, the report notes the precedents for differentiated arrangements within the UK in this field and calls on the UK government, in bringing forward its forthcoming Immigration Bill, to 'look for opportunities to enhance the role of the devolved institutions in managing EU migration. Local and regional economic and demographic needs, rather than central targets, should drive decision-making.' While a wholesale conferral of powers upon devolved administrations to manage their own immigration policies post-Brexit is not envisaged (at least by the UK government), there are a growing number of voices pushing for differentiated arrangements to be established. It is just too early to predict what will happen here.

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# Chapter 9

## Equality Law

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### Introduction

Since the earliest days of the UK's membership of the EEC, the impact of EU law on the UK's system of equality law has been considerable. Equality and non-discrimination are fundamental principles of EU law and have been acknowledged as such by decisions of the CJEU (e.g. Case 13/94 [P v S and Cornwall County Council](#)). The UK's lack of a written constitutional guarantee of equality means that its realisation depends on a system of rights provided by primary and secondary domestic legislation. The EU has played an important role in this context by 'protecting equality rights against erosion and in pushing forward expansion' ([Fredman et al 2016](#), Para 8).

The UK's obligations arising through its EU membership have compelled the government of the day to implement directives by way of domestic law and to take account of decisions of the [Court of Justice of the EU](#) (CJEU). The CJEU's jurisprudence has become part of UK law and has had a profound effect in this context (see Case 43/75 [Defrenne v Sabena](#)). In addition, the EU's social and economic agendas have helped to ensure that changing equality concerns are acknowledged and acted on through accompanying policy and soft law measures in related areas such as [childcare](#) and the challenges of [caring for](#) an aging population.

Given this book's focus on Scotland, it should be noted that 'Equal opportunities', and therefore equality law, with some limited exceptions, is essentially reserved. The key European rights are therefore implemented almost exclusively through UK legal sources, and in particular the [Equality Act 2010](#) (EA). For a detailed discussion of the exceptions and scope for the future development of a distinctive Scottish approach to equality law, see Muriel Robison's [SULNE Position Paper](#).

### Development and Provision of EU Equality Law

The EU's founding treaties contain equality guarantees, now incorporated in the amended and consolidated [Treaty on European Union](#) (TEU), which sets out the aims and objectives of the EU as being 'founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.....[which] are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail' ([Article 2 TEU](#)).

The consolidated [Treaty on the Functioning of the European Union](#) (TFEU) contains a number of articles relevant to equality and non-discrimination, in particular [Article 18](#) (nationality), [Article 19](#) (equal treatment), [Article 45](#) (free movement of workers) and [Article 157](#) (equal pay).

## Gender Equality

One of the most important articles which was included in the founding treaty is Article 157 TFEU (equal pay), requiring Member States to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. The inclusion of this provision in the original founding treaty provided the legal base for secondary legislation (directives) addressing discrimination in pay and equality of treatment between women and men in employment and training.

Between the mid-1970s and mid-1990s, there was considerable legislative activity in the EU equality context, resulting in the introduction of four major directives on gender equality, all of which have been subsequently amended:

- Equal Pay Directive (75/117/EEC) – requires equal pay between women and men
- Equal Treatment Directive (76/207/EEC) – requires equal treatment in employment and occupation
- Directive on Occupational Social Security Schemes (86/378/EEC)
- Burden of Proof Directive (97/80/EC) – shifts the burden of proof where a suspicion or inference of discrimination is raised

These have been consolidated and updated in the [Equal Treatment Directive \(Recast\)](#) (2006/54/EC). This Recast Gender Directive is now the key directive setting out the requirement for equal treatment between women and men in the employment context, and is now implemented in the UK through Parts 2, 5, 9 and 10 of the [Equality Act 2010](#).

There are a number of other EU measures relevant to gender equality in particular, which have been implemented through other treaty provisions, and which have required amendments to domestic law (see the [Employment Law](#) chapter):

- [Pregnant Workers Directive](#) (92/85/EEC) (PWD) – addresses the treatment of pregnant women at work (including provisions for maternity leave, breastfeeding, time off for ante natal care, risk assessments and the prohibition of dismissal). Despite its obvious relationship with gender equality, the PWD was primarily enacted as a health and safety measure through [Directive 89/391](#) and (what is now) [Article 154 TFEU](#). However, the Recast Directive does make specific reference to it. In the UK, the PWD is implemented largely through the [Employment Rights Act 1996](#) (ERA), and related regulations, in particular the [Maternity and Parental Leave etc Regulations 1999](#) (MAPLE), the relevant regulations under the [Health and Safety at Work Act 1974](#), as well as the EA 2010 The [Parental Leave Directive](#) (originally 94/34/EC, now replaced by 2010/18/EU) which provides for parental leave on birth or adoption, and for time off for family emergencies. This is implemented through the ERA and MAPLE
- [Part-time Workers Directive](#) (97/81/EC) – requires *pro rata* treatment of part-time workers, implemented through the [Part-time Workers \(Prevention of Less Favourable Treatment\) Regulations 2000](#)
- [Fixed-Term Workers Directive](#) (99/70/EC) – limits the scope of fixed term contracts, implemented through the [Fixed-Term Employees \(Prevention of Less Favourable Treatment\) Regulations 2002](#)
- [Temporary Agency Workers Directive](#) (2008/104/EC) – provides that basic working and employment conditions of temporary agency workers should be at

least those that would apply if they had been recruited directly to the same job, implemented through the [Agency Workers Regulations 2010](#)

Other potentially relevant directives are applicable in the employment context (see the [Employment Law](#) chapter) and include the [Young Workers Directive](#) (94/33/EC) and the Posted Workers Directive ([96/71/EC](#) and [2014/67/EU](#)).

## Beyond Gender and Nationality

In 1997, the [Treaty of Amsterdam](#) extended the competence of the EU to deal with discrimination beyond gender and nationality. [Article 19 TFEU](#) gives the Council the power to take action to combat discrimination, which ‘acting unanimously... [with the] consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’. This article provides the legal base for a number of important directives, namely:

- [Race Directive](#) (2000/43/EC) – covers race discrimination in employment, goods and services, housing, education and social protection
- [Framework Directive](#) (2007/78/EC) – covers sexual orientation, disability, age, religion and belief discrimination in the employment context
- [Gender Directive 2004/113/EC](#) (covering gender discrimination in the provision of goods and services)

These are all now implemented into domestic law through the EA 2010. The Race and Recast Gender Directives require the establishment of a body for the promotion of equal treatment on grounds of race and sex. This requirement is currently fulfilled by the establishment of the [Equality and Human Rights Commission](#) under the EA 2006.

## Charter of Fundamental Rights of the European Union

The TEU has the effect of incorporating the [Charter of Fundamental Rights of the European Union](#) (CFR) into the EU’s constitutional law, so that it has binding effect and the same status as the TFEU and TEU. The CFR sets out the full range of civil, political, economic and social rights of EU citizens and of all persons resident in the EU. Although it is part of the EU’s constitutional law, the CFR does not in itself guarantee any key rights, but reaffirms those provisions which exist elsewhere in EU law and which originate from a range of sources, including ‘the constitutional traditions and international obligations common to the Member States, the [European Convention for the Protection of Human Rights and Fundamental Freedoms](#), the Social Charters adopted by the [Union](#) and by the [Council of Europe](#) and the case law of the Court of Justice of the European Union and of the [European Court of Human Rights](#)’ (CFR Preamble, Para 5).

The CFR’s scope is extremely broad: it contains fifty substantive articles, organised into six chapters: Dignity, Freedoms, Equality, Solidarity, Citizens’ Rights, and Justice. Each article covers at least one – and many several – rights and freedoms. Whilst it incorporates the European Convention on Human Rights, and must be interpreted in the same manner (see [Article 52\(3\) CFR](#)), its scope is broader and its provisions update the rights contained therein in line with changing social and economic circumstances. Furthermore, the CFR contains some additional

protections – for example, in the broad area of social rights and, more specifically, in relation to non-discrimination (see [Article 21 CFR](#)).

With the addition of the CFR to the pre-existing framework of rights and duties, equality and the protection of human rights (see the [Human Rights Law](#) chapter) can be said to constitute primary goals of the EU – see [Article 6\(1\) TEU](#).

## Impact of EU Law on UK Equality Law

It is evident from the wide scope and specific provision of EU equality law that its impact on the UK's equality and non-discrimination framework has been considerable. Alongside its extensive application in the employment field (see the [Employment Law](#) chapter), EU equality law has impacted on the provision of goods and services, housing, education and associated areas of social protection. The underpinning guarantee of equality provided by EU law's application in these areas has provided an effective substitute for the written constitutional provision of other jurisdictions. As [Fredman et al](#) have stated (at Para 8):

The absence of a codified constitution in the UK means that a constitutional equality guarantee is lacking. Instead, anti-discrimination and equality law in the UK has developed on a statutory basis culminating in the EA 2010. Throughout this development, EU law has played a powerful role in protecting equality rights against erosion and in pushing forward expansion.

As well as the expansion of the UK's statutory framework through the implementation of EU directives, EU membership has enabled UK citizens to claim rights available under EU law which have not been adequately implemented in domestic law through the principle of *direct effect* (see Case 43/75 [Defrenne v Sabena](#)). Furthermore, the ability of courts and tribunals in the UK to refer cases to the CJEU for preliminary rulings on the interpretation of EU law under [Article 267 TFEU](#) has been used to clarify and extend equality laws in the UK.

Examples include the removal of the upper limit for compensation for discrimination (Case C-152/84 [Marshall v Southampton Health Authority](#)), the broadening of the scope of sex discrimination to include transgender people (Case C-13/94 [P v. S and Cornwall County Council](#)), and the introduction of discrimination by association into UK law (Case C-303/06 [Coleman v Attridge Law](#)) – now covered by the definition of direct discrimination in s. 13, EA 2010. The European Commission's powers to bring infringement proceedings against Member States for non-compliance with EU law under [Article 258 TFEU](#) has led to direct improvements in UK equality law (e.g. in equal pay law, see Case C-61/81 [Commission v United Kingdom](#)).

## Brexit and UK Equality Law

There is unlikely to be a tidal wave of change in the scope or provision of equality law at the time of the UK's exit from the EU. The protections currently provided by the EA 2010 are fairly extensive and, even where such provisions are underpinned by EU law, their application on Exit Day is intended to be guaranteed by the [European Union \(Withdrawal\) Bill](#) (EUWB) (Clauses 2, 3 and 4). Of course, this by no means guarantees the preservation of the scope and level of current protections beyond Exit Day and the so-called Henry VIII clauses contained in Clauses 7-9 of the EUWB raise particular concerns that EU-derived equality laws contained in secondary legislation will be vulnerable to amendment with little or no parliamentary scrutiny.

The potential risks to equality law are likely to emerge over time and can be categorised as arising from two distinct, yet inter-related, areas: current gaps in domestic provision and the loss of future developments arising under EU law, each of which will be considered below.

## Current Gaps in Domestic Provision

The EA 2010 is a self-standing Act of Parliament which is not reliant on the [European Communities Act 1972](#) (ECA) and will remain in force following the repeal of the ECA and the UK's departure from the EU. However, the EUWB which provides that the ECA 'is repealed on Exit Day' (Clause 1) empowers UK ministers to repeal or amend primary legislation in order to decouple UK law from EU law (Clauses 7, 8 and 9). This could put the provisions of the EA 2010 at risk, in the absence of the guarantees currently offered by EU law. [Fredman \*et al\*](#) (at Para 12) have expressed concern about the potential for equality to be undermined once EU law is no longer applicable in the UK:

Even without express repeal of the EA 2010, there is a risk of further undermining equality through such devices as increasing the number and scope of exceptions, loosening justifications for discriminatory behaviour, restricting the scope of equality protections, imposing caps on compensation, increasing qualifying periods and narrowing the definition of worker.

Even with the enhanced protections provided by EU law, UK equality law contains some potential gaps in protection which may be easier to exploit following Brexit. [Colm O'Coinneide](#) has recently raised concerns about the lack of protection against discriminatory legislation offered by the EA 2010:

...the requirements of the 2010 Act do not make anything unlawful which is authorised by other primary or secondary legislation. This means that UK anti-discrimination legislation does not place many obstacles in the way of Parliament or ministers choosing to enact discriminatory legislation. Nor does it require existing legislation to be interpreted in an equality-friendly manner.

As O'Coinneide points out, this gap in legal protection which has to date been filled by the UK's international human rights obligations, combined with EU equality law, will not easily be plugged post-Brexit as 'the common law has historically provided little or no protection against discrimination'.

EU law aside, the UK's own equality framework does contain some opportunities for enhancement, particularly in the context of further devolution. The Public Sector Equality Duty (PSED) provided by s. 149 of the EA 2010, which requires public authorities to take action to promote equality of opportunity, although largely procedural in nature, offers some scope for improvement. For further detail on the PSED and Scottish specific duties and Brexit, see Muriel Robison's [SULNE Position Paper](#).

The PSED does not extend to socio-economic inequalities. Although s. 1 of the EA 2010 provides for a further duty which would have compelled public authorities to give due regard in strategic decision-making as to how to exercise their functions in a way that reduces socio-economic inequalities, this provision was never enacted by the UK government. The Scottish government is currently consulting on how best to [implement this duty](#) in respect of its devolved functions.

## Loss of the Future Development of EU Law

It is obviously difficult to identify and measure the effect of potential improvements in EU equality law which will be lost to the UK following Brexit. However, two obvious channels for future development are the CFR, which is still at a fledgling stage, and the jurisprudence of the CJEU, which has already had considerable influence on the UK's equality law framework.

### *Charter of Fundamental Rights*

The CFR, which remains largely untested due to its relative youth, is likely to be the source of further development. In giving evidence to the UK parliament's Women and Equalities Select Committee's (WESC) inquiry on [equality law and Brexit](#), Sandra Fredman (at Para 37) pointed out that the list of personal characteristics protected under Chapter 1 of the EA 2010 is limited to nine specified grounds, whereas the scope for expanding such protection under the CFR is unrestricted and could be extended to include a greater number of grounds – for example, class, caste, background and carer status, in line with judicialisation and in response to social progression.

However, despite the political assurances that all current protections arising from EU law will be preserved at the date of the UK's withdrawal from the EU (see the [Repeal Bill White Paper](#), 1.24), Clause 5(4) of the EUWB provides that 'The Charter of Fundamental Rights is not part of domestic law on or after exit day'. This is of concern because, as stated above, the CFR contains rights which go beyond those of the ECHR, and includes important protections in evolving areas concerning social and workers' rights.

As well as the potential for a diminution in existing rights, the loss of the CFR will contribute to the uncertainty regarding the future protection of equality and human rights standards in the UK and their interpretation by the courts, particularly given recent discussions about a [British Bill of Rights](#) and the removal of European jurisprudential influence on British legal institutions.

In Scotland, the devolved nature of human rights means that there is some potential for divergence in this context (see the [Human Rights Law](#) chapter), particularly given the Scottish government's commitment to [fulfil its international obligations](#). However, unlike EU law, international law does not guarantee specific rights, and so any resulting development is likely to be weaker in substance and effectiveness than that which might emerge by way of the CFR.

### *Jurisprudence of the CJEU*

At the time of writing, it is impossible to predict what the [future relationship](#) between the CJEU and the domestic courts will be. If the CJEU does not have jurisdiction in the UK following the UK's departure from the EU, individuals in the UK will not be able to claim direct effect of EU equality law, courts and tribunals will not be able to refer cases to the CJEU for preliminary references or to disapply law found to be incompatible with EU law – although it is unlikely that they will be prevented from referring to EU case law, given its international status.

One obvious effect of the loss of the CJEU's direct influence is the potential for the erosion of effective and accessible remedies for breaches of equality and human rights law, particularly as the [Human Rights Act 1998](#) does not incorporate Article 13

ECHR, which requires an effective remedy before a national authority. [Fredman \*et al\*](#) (at Para 12) have identified what they call ‘a crucial need for a statutory principle of effective remedies’ to be incorporated into UK law following Brexit.

Referring to the loss of the CJEU’s function as ‘an arbiter of incompatibility with the principles of equality’, the WESC [Brexit report](#) (at Para 40) called for additional action to be taken to preserve the present situation as closely as possible so that the government can ‘achieve its objectives of fundamental protection for equality rights’. However, in its [written submission](#) to the WESC inquiry, the UK government stated:

We are not leaving the European Union only to return to the jurisdiction of the European Court of Justice....the Equality Act 2010 incorporates relevant existing CJEU judgments and Government will continue to monitor such judgments being made by the European Court for any implications these may have for the Act until the point when EU law ceases to apply.

At the time of writing, the UK government appears to holding on to this ‘[red line](#)’ in the Brexit negotiations, despite criticisms from [academic commentators](#), a [former UK judge at the CJEU](#), and the former head of the [Government Legal Department](#). However, it might well be the case that the jurisprudence of the CJEU cannot be easily excluded and that the Court’s influence may continue to be felt following Brexit, albeit *indirectly*. As [Karen Monaghan QC](#) explained in her evidence to the WESC inquiry, at Para 45:

When we do cases here, we typically ask the court to consider cases from Canada or South Africa – countries whose legal systems, social norms or broad political commitments are fairly similar – because we learn from them. It is likely that there would be some drawing on the Court of Justice case law, even if we were not formally bound by it, but of course it would not have directly effective impact; it would not require our courts to comply with any judgments, but it is likely to inform them.

## Conclusion

It is apparent that EU law and policy have had a major influence on the UK’s equality framework. The main concerns regarding the UK’s exit from the EU in the current context revolve around the potential diminution or reduction in equality protections, which will be felt over time, without the guarantee of non-regression (see the [suggestions](#) for draft equality clauses for overcoming this contained in the WESC report), and the continuing influence of the EU’s constitutional provisions and jurisprudence of the CJEU.

Despite the fact that the UK has comprehensively implemented all main EU provisions in the EA 2010, there is still much at stake and it is impossible to predict at this stage how developments will unfold with regard to this important area of law. As [Colm O’Cinneide](#) puts it:

It is no exaggeration to say that EU law has been the engine that has hauled the development of UK anti-discrimination law along in its wake: without its influence, British legal standards would be much weaker than they currently are. Post-Brexit, it remains to be seen how UK courts will interpret the provisions of the 2010 Act, and how they will apply previous precedents which have regularly been decided by reference to the requirements of EU law.

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# Chapter 10

## Employment Law

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### Introduction

EU-derived employment laws (which together are often referred to as ‘European labour law’) cover a patchwork of laws within the UK. Apart from the provisions in the Treaty on the Functioning of the European Union (TFEU) which enable the EU institutions to act in order to facilitate the free movement of workers (see [Article 45 TFEU](#) and the [Free Movement of Persons](#) chapter), there is limited additional EU competence to legislate in employment matters (mainly contained in [Article 153 TFEU](#)).

### What Effect Has the EU Had on UK Employment Law?

The ‘European labour law’ which has evolved since the foundation of the European Communities is characterised by a variety of common strategies adopted at different moments.

The earliest strategy is that which characterised the founding of the European Union’s predecessor, the European Coal and Steel Community, established in 1951: active labour market policy and labour involvement in regulation. In complete contrast, the following period was characterised by a strategy of neo-liberal laissez-faire, reflected in the almost total absence of social policy and labour law provisions in the EEC’s founding treaty (1957). Labour law was [initially excluded](#) from EU competence on the basis that:

So long as we confine our attention to international differences in the general level of costs per unit of labour time, we do not consider it necessary or practicable that special measures to ‘harmonise’ social policies or social conditions should precede or accompany measures to promote greater freedom of international trade.

Social policy was in essence to remain within the regulatory domain of the nation state. As a result, European social policy in the founding [Treaty of the European Economic Community](#) (EEC) was limited to the free movement of workers, equal pay and cooperation in the area of social security. The treaty also made provisions for cooperation between the EEC and the International Labour Organisation (ILO) and it [was hoped](#) that ILO Conventions could be used to ‘solve certain of the social problems connected with closer European economic cooperation’. However, effective cooperation between the two organisations has proved to be sporadic. Within the EU, any attempts which have been made to introduce a comprehensive labour or social policy have been dependent on the effective accommodation of political interests.

The accession to the EEC of the UK in 1973 coincided with the beginning of a period of unprecedented legislative activity in the EEC under the framework of a Social Action Programme. A number of equality directives (equal pay, equal treatment, social security) (see the [Equality Law](#) chapter) and directives on collective dismissals, acquired rights upon transfers of undertakings, and protection of workers

in insolvency were mostly approved by the Council of Ministers during the period of the UK Labour governments of 1974-1979. Their impact on domestic labour and social law has been profound.

Following the election of Margaret Thatcher's government, the principal EEC legislative activity on labour policy was confined to the sphere of health and safety at work. Otherwise, EEC legislative activity in the labour field largely halted in the face of the UK government's rejection of almost all proposals from the Commission, and their consequent failure to achieve the necessary unanimous approval in the Council of Ministers. This abrupt change in policy led the then European Commission President, Jacques Delors, to (successfully) search for a non-legislative strategy to develop a European social dimension. In addition, the 1992 objective of the European Single Market led to pressures for a strategy to achieve a social dimension through fundamental social and economic rights.

It is not surprising, therefore, that particularly following the entry into force of the [Maastricht Treaty](#) in 1993, the European Commission together with the 'social partners' (trade unions and employer representatives) through a process called 'social dialogue' (developed in 1985), took advantage of the treaty provisions in actively pursuing a social policy in order to adopt a floor of workers' rights, and legislated for measures covering a wide range of equality rights (see the [Equality Law](#) chapter), some individual employment rights, limited collective rights, and comprehensive health and safety rights. A full overview of current UK legislation which is derived from EU law is available from the [SULNE Position Papers](#) (also see the [Equality Law](#) chapter).

This period, when the terms 'social Europe' and 'European labour law' were coined and which introduced a wide range of workers' rights in the UK at a time when a UK (Conservative) government was pursuing a deregulatory employment agenda at domestic level, is widely regarded as positive for the development and advancement of workers' rights in British labour law.

The end of the 20th century and the beginning of the 21st century have, however, been characterised by a period of legislative stagnation in the social policy sphere at EU level. Instead of 'hard law' (legislation), the Commission turned to a new *modus operandi* for pursuing a 'social Europe'. Since the turn of the century, the emphasis has been on soft law mechanisms through the [European Employment Strategy](#), such as framework agreements, joint declarations and guidelines and codes of conduct, in order to achieve some sort of harmonisation in the sphere of social policy. A number of reasons have been put forward for this shift in preference from hard law to soft law mechanisms. The most common reason cited in the academic employment law literature is the lack of enthusiasm for social measures within the European Commission, which is charged with pursuing a neo-liberal agenda when it comes to workers' rights.

In addition to the legislation, and regardless of the Commission's preference for regulation, EU law is underpinned by general principles which have been used by the Court of Justice of the European Union (CJEU) to progressively widen the scope of protections and rights granted to workers under EU law (see, for example, Case C-555/07 [Kücükdeveci](#)). Examples of the CJEU's progressive jurisprudence include the case law around the Working Time Directive (such as Case C-155/10 [Williams](#)), which has extended the definition of 'working time' and decisions on equal pay, sex discrimination or parental leave. The CJEU's case law can be contrasted with the

approach of UK courts, which have tended to give a narrow interpretation of employment rights.

EU-derived employment laws are also underpinned by a framework of rules which give effect to them. Thus, EU law takes primacy over national law and operates as a limitation on parliament's sovereign powers (see Case 6/64 [Costa v Enel](#) and the [Constitutional Law](#) chapter). Domestic courts must give direct effect to those rights which are sufficiently clear (Case 43/75 [Defrenne v Sabena](#)) and have an obligation to interpret national law in accordance with EU law (Case C-106/89 [Marleasing](#)). Infringement proceedings can be brought against the UK government in cases of non-compliance with EU law. Finally, EU law provisions (such as [Article 19 TEU](#)) require Member States to provide effective procedures and remedies for the enforcement of employment rights.

Overall, therefore, EU-derived employment laws cover a patchwork of rights in the UK. Although it is difficult to predict what would have happened if the UK had never joined the EU, it is likely that some of these rights would have been enacted regardless of the country's EU membership and, in some instances, the UK has gone further than required under EU law. This is often referred to as 'gold-plating'. Examples include minimum holiday or maternity leave entitlements. In other cases, EU rules have introduced rights into UK employment law, such as rules on information and consultation within businesses, which sit uneasily with the British system of industrial relations and their effect has therefore been limited.

Yet all of this does not negate the largely positive effect that EU membership has had on UK employment law. The overall framework created by EU law which includes not only positive rights in legislation and case law, but also rights to enforcement and effective remedies, constrains government action and creates a minimum floor of rights for workers in one of the least-regulated labour markets amongst OECD countries. According to the OECD's [employment protection index](#), the UK comes in at 31st out of 34 rich countries.

## **Brexit's Potential Impact**

The impact of Brexit on employment law is, for obvious reasons, difficult to predict. Much depends on the future relationship between the EU and the UK. Potential options that have been discussed include (continued) membership of the European Economic Area (EEA) and/or the European Free Trade Association (EFTA); a series of bilateral deals with the EU; or a 'hard' Brexit (i.e. an exit from both the single market and the customs union).

Should the UK negotiate (continued) membership of the EEA, then most EU laws on workers' rights would continue to apply and future EU laws in this area would need to be implemented by the UK government, and would therefore apply in Scotland. The case law of both the EFTA Court and the Court of Justice of the European Union would be of relevance. The 'bilateral' option is often referred to as either the 'Switzerland' or 'Turkey' model. Under this scenario, the UK would negotiate a series of bilateral deals with the EU in order to gain enhanced access to the single market.

It is likely, in this case, that the UK will continue to have to abide by EU employment laws, so as to prevent distortions of competition. Regardless of the eventual future relationship between the UK and the EU, a transition period after the UK exits the EU is likely, during which the UK's rights and obligations as an EU Member State are

phased out. EU law may therefore continue to apply to pending employment disputes which began before UK withdrawal from the EU.

Leaving the EU will entail the amendment and probable repeal of the [European Communities Act 1972](#) (ECA – the national legal basis of the UK's membership of the EU). This would have consequences for the majority of EU employment laws which have been implemented into UK law by virtue of secondary legislation made under the framework of the 1972 Act. An example can be found in the [Agency Worker Regulations 2010](#). Repeal of the act would leave the status of these regulations unclear because they depend on the act – the primary legislation – for their effect. The 2017 [Queen's Speech](#) outlined a number of bills, of which eight wholly concern measures around Brexit, including the [European Union \(Withdrawal\) Bill](#) (often referred to as the 'Great Repeal Bill') the primary objective of which will be to repeal the (ECA) on Brexit Day and to preserve the massive amount of EU-inspired law in the UK.

However, in the area of employment law, it is not as simple as a 'copy-and-paste' exercise. For example, the remedies and state accountability checks which EU law offers will likely fall away after Brexit. An example of where an EU principle was successfully used was the high-profile Supreme Court decision in [R \(on the application of UNISON\) v Lord Chancellor](#), where the Court ruled, in part in reliance on the EU law principle of access to justice, to find the imposition of employment tribunal fees to be unlawful. In addition, leaving the EU will remove the mechanisms for enforcing EU-derived rights from domestic law. Thus, workers will no longer be able to rely on the principle of direct effect, the interpretive obligation imposed on national courts will eventually fall away and there will (presumably) be no access to the Court of Justice. Similarly, there are a number of EU-wide bodies set up to coordinate health and safety as well as technical standards across the EU which will need to be replicated in the UK (or an arrangement reached for future UK participation in these bodies).

The UK government is likely, post-Brexit, to embark on a lengthy and costly review exercise of employment law, with a view to deciding whether to repeal, adjust or preserve it. The EU (Withdrawal) Bill therefore proposes to delegate statutory powers for a limited period of time to enable ministers to make changes, by administrative regulation, to give effect to the outcome of the negotiations with the EU (see Clauses 7-9). Corresponding powers are also conferred on devolved institutions (see Clause 10 and Schedule 2). These so-called 'Henry VIII clauses' cause concern, as they would allow the government to circumvent the full legislative process, which the executive would otherwise need to use in order to enact primary legislation. In the case of employment laws, it would facilitate the amendment or repeal of those rights to which the government is particularly opposed without adequate parliamentary oversight.

Separately – and subject to whatever post-Brexit relationship is concluded – the UK government, parliament and courts might wish to consider (unilaterally) whether EU law developments in a given policy field might be usefully borrowed and incorporated into future UK legal and policy developments in the same field. Of course, the UK government and parliament would be free to apply – in the sense of mirroring in UK law and practice – any future EU laws where it agrees on its content.

In the event of a 'hard' Brexit and in the absence of an obligation to abide by harmonised EU rules, the UK could seek competitive advantages by implementing

labour standards that are less onerous for employers than those required of their counterparts in the European Union. Based on long-standing opposition of some past UK governments to certain EU social rights, one [independent legal opinion](#) commissioned by the TUC in the run-up to the referendum vote identified a number of EU-derived employment laws which would be especially vulnerable to repeal and/or amendment. These include laws on information and consultation on collective redundancies; rules on working time; some of the EU-derived health and safety regulations; parts of the regulations which protect workers in the event of a transfer of undertaking; legislation protecting agency workers; and some elements of discrimination law to which businesses most strongly object, such as liability for equal pay. However, one must also question the extent to which a future government will actually repeal existing rights once given the chance, especially as the UK's labour market is already one of the least regulated in the EU.

The main causes of concern for employers and trade unions when it comes to workers' rights do not have a direct EU origin. Employers complain about the new higher minimum wage (the so-called 'living wage'), the 'apprenticeship levy', restrictions on skilled migrant workers, and the requirement for large companies to publish their gender pay gaps. At a legislative level, trade unions are concerned about the introduction of the [Trade Union Act 2016](#) which places severe restrictions on the right to take industrial action. All of these developments stem from UK governments, rather than from the EU legislature.

## Further Reading

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## Chapter 11

# Environmental Protection and Law

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### Introduction

Environmental protection has been held to be a ‘wall breaker’ for the EU,<sup>13</sup> as already in the 1970s it pushed the EU project beyond its economic foundations to include broader concerns of human wellbeing. Since then, over 200 secondary legislative instruments on a wide range of environmental topics have been adopted.<sup>14</sup> Additionally, the EU has increasingly integrated environmental considerations into other areas of EU law. It is estimated that nowadays 70-80% of national environmental legislation in the Member States is of EU origin.<sup>15</sup>

This chapter will first briefly introduce the fundamental elements of EU environmental law (and its basis in the Treaties). It will then discuss three different aspects of EU environmental regulation, which have made significant contributions to environmental protection in the UK: nature conservation, environmental integration and procedural environmental rights. It will, in particular, use the Common Agricultural Policy and Common Fisheries Policy, two frameworks of sectoral legislation with great relevance to the environment, as illustrative examples. Against this backdrop, it will discuss the implications of Brexit for environmental protection in the UK and Scotland, concluding that despite risks of lowering protection levels, there are also opportunities for more ambitious approaches and for the recognition of local needs.

### Basics and Basis of EU Environmental Law

Since the entry into force of the [Single European Act](#) in 1987, the EU has an explicit legislative basis for autonomous environmental policy making. [Article 191 TFEU](#) lists the following objectives: preserving, protecting, and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. The article thus leaves the EU with ample flexibility to tackle emerging environmental issues. However, the exercise of EU competence in environmental matters is restricted by the principle of subsidiarity: the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States themselves ([Article 5 TEU](#)).

Moreover, EU law provides for minimum environmental harmonisation only, thus allowing Member States to maintain or introduce more stringent environmental

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<sup>13</sup> Sadeleer, N (2014) [EU Environmental Law and the Internal Market](#) (Oxford University Press), p. v

<sup>14</sup> Morgera, E ‘Environmental Law’ in Barnard, C and Peers, S (eds) (2017) [European Union Law](#), (2nd Edition, Oxford University Press), p 657

<sup>15</sup> Kramer, L ‘Regional Economic International Organizations: The European Union as an Example’ in Bodansky, D, Brunnée, J and Hey, E (eds) (2007) [The Oxford Handbook of International Environmental Law](#) (Oxford University Press)

measures ([Article 193 TFEU](#)). Various principles of EU environmental policy, furthermore, govern any action taken in this field. These include, amongst others, the principle of a 'high level of environmental protection' ([Article 3\(3\) TEU](#)); the integration principle ([Article 11 TFEU](#)), the precautionary, prevention, and polluter pays principles ([Article 191\(2\) TFEU](#)).

## Contribution of EU Law to Nature Protection in the UK

EU law on nature protection was at the forefront of EU environmental action, with its two pieces of flagship legislation, the [Birds Directive](#) and the [Habitats Directive](#), dating back to the 1970s and early 1990s. The directives provide for a network of protected areas – Special Protected Areas (SPAs) under the Birds Directive and Special Areas of Conservation (SACs) under the Habitats Directive, together known as Natura 2000 sites. Additionally, the directives provide for direct species protection, through prohibitions of activities directly harmful to a protected species, or by imposing monitoring and reporting obligations regarding their status.

The directives have led to an increase in the [level of protection](#) previously offered under UK law for Sites of Special Scientific Interest (SSSIs). Increased protection is not only important for ecological reasons, but also for human wellbeing. Internationally and within the EU, it is increasingly recognised that the effective [exercise of human rights](#) greatly depends on the maintenance of healthy ecosystems. In 2016, the UK [committed internationally](#) to consider relevant linkages between health and biodiversity, in recognition of biodiversity as a source of nutrition, medicines, heating, clothes, clean water and shelter.

The implementation of the EU's directives is still [considered inadequate](#) in the UK, with only 8.53% of the national land area covered by Natura 2000 sites, and 71% of protected habitats considered to be of an unfavourable-bad status. The European Commission has used both softer (progress reporting requirements, deadlines) and harder ([infringement proceedings](#)) instruments to direct Member States, including the UK, towards better implementation. The EU's nature framework has been considered a '[clear and logical framework of rules](#)' and it has been held that 'investing in Natura 2000 makes good economic sense', considering its relevance for the environment, people and the economy and its very low cost-benefit ratio.

## Beyond Environmental Legislation: The Value of Integration

As a general principle of EU law, environmental integration ([Article 11 TFEU](#)) is framed in mandatory wording. It allows environmental measures to be adopted under non-environmental policies and for environmental principles to be applied in a non-environmental context. This has resulted in an 'integrationist' approach in the development of EU environmental law (e.g. by promoting reliance on environmental impact assessment), as well as 'greening' other areas of EU law, such as the Common Agricultural and Fisheries Policies.

Although the Common Agricultural Policy (CAP) initially primarily aimed at increasing productivity, the current CAP 2014-2020 integrates various [environmental measures](#). These include cross-compliance obligations for basic payments ([Regulation 1306/2013](#)) and mandatory greening payments ([Regulation 1307/2013](#)). Additionally, the CAP's Rural Development Fund seeks to contribute to environmentally-balanced and climate-friendly development of rural economies, whilst providing Member States

with considerable leeway to decide on the particular needs of their regions ([Regulation 1305/2013](#)).

Similarly, the [Common Fisheries Policy \(CFP\)](#) has [shifted away](#) from its initial focus on [commercially valuable species](#), towards a more [holistic approach](#) encompassing non-target organisms and sensitive habitats. The overarching objectives of the CFP now include the long-term sustainability of fisheries activities, the application of the precautionary and ecosystem-based approaches, and the achievement of coherence with EU marine environmental policy. Moreover, funding under the European Maritime and Fisheries Fund (EMFF) seeks to reduce the environmental impacts of fishing and contribute to the protection and restoration of aquatic biodiversity and ecosystems ([Regulation 508/2014](#)). Nevertheless, while significant progress has been achieved in greening the CAP and the CFP, there remains ample scope for further enhancing the environmental sustainability of the agriculture and fisheries sectors.

The principle of environmental integration has also allowed for the mainstreaming of environmental considerations into a wide range of sectoral policies at the national level, as it is binding not only on the institutions and agencies of the EU, but also on those of the Member States when they are interpreting and implementing Union law ([Article 52\(5\) EU Charter](#)). An example is the cross-compliance rules under the CAP, which cross-reference 13 legislative standards in the field of environment, food safety, animal and plant health and animal welfare. In the context of Brexit, this means that integration could complicate the elimination of a piece of EU environmental law from the UK legal system, as it is likely to ‘unravel’ other connected environmental legislation and related sectoral and cross-sectoral legislation.

## **Procedural Rights and the Implementation of the Aarhus Convention**

EU law protects certain key [human rights of relevance](#) to the environment, which are predominantly procedural in nature: namely, access to environmental information, public participation in environmental decision-making and access to justice in environmental matters. In addition to being the subject of a dedicated [EU directive](#), the right of all natural and legal persons to access environmental information held by public authorities has been enshrined in several EU legislative instruments across a range of environmental policy sectors (e.g. Article 19 of the [Marine Strategy Framework Directive](#)). Similarly, provisions on public participation are found in sectoral pieces of EU environmental legislation (e.g. the [Water Framework Directive](#)), as well as in legislation relating to the assessment of the environmental effects of [public and private projects](#), the strategic environmental assessment of [plans and programmes](#), and permitting processes regarding [industrial installations](#).

Even though the European Commission has been [unsuccessful](#) in introducing a directive on access to justice in environmental matters, the EU judiciary has [indicated](#) that relevant national regulations must be interpreted in such a manner as to avoid making the exercise of the right impossible, or excessively difficult, in practice. Moreover, Articles 2, 6(1), 8, 10, and 13 of the [European Convention on Human Rights \(ECHR\)](#) have been [interpreted](#) by the European Court of Human Rights as incorporating procedural as well as substantive environmental rights. The relevant case law [informs the interpretation](#) of analogous provisions of the EU Charter of Fundamental Rights (Articles 2, 7, 11, 17, 42 and 47 CFR), which has been endowed with the status of primary EU law ([Article 6\(1\) TEU](#)).



EU law on procedural environmental rights is inextricably linked with the implementation of the [Aarhus Convention](#) on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which was elaborated under the UN Economic Commission for Europe (UNECE). All EU Member States are individually parties to the convention, and the EU is also a party in its own right. Even though the UK will continue to be bound by the obligations enshrined in the Aarhus Convention after Brexit, challenges may arise from the loss of the 'hard, enforceable edge' that EU law has conferred on this international treaty by providing a basis for the European Commission and the EU judiciary to monitor its implementation by the Member States.<sup>16</sup>

The judgments issued by the Court of Justice of the EU in the context of a [preliminary reference](#) submitted by the UK Supreme Court and an [infringement action](#) brought against the UK by the European Commission in relation to the prohibitive effect of litigation costs on access to justice in environmental matters were among the catalysts of a broad-ranging reform of the England and Wales costs regime in 2013.<sup>17</sup> By capping the cost of judicial proceedings for certain categories of environmental cases, this reform was an important step forward in eliminating some of the procedural hurdles that hindered access to justice for many individuals, communities and non-governmental organisations (NGOs), which are the actors most likely to bring cases for judicial review.

Post-Brexit, UK compliance with the Aarhus Convention will continue to be monitored by a body established under the convention, namely, the Aarhus Convention Compliance Committee (ACCC). An important feature of the ACCC is that it allows individuals and NGOs to submit complaints regarding the noncompliance of state parties with the provisions of the convention. Even though the direct involvement of civil society promotes legitimacy and justice, the ACCC nevertheless lacks the 'hard enforcement' infrastructure provided by the European Commission and the Court of Justice of the EU, as it is only able to issue non-binding recommendations. On the other hand, once they have been endorsed by the Meeting of the Parties to the Aarhus Convention, the recommendations of the ACCC are considered authoritative interpretations of the treaty provisions, which must be [taken into account](#) by domestic authorities and courts in the interpretation and implementation of the convention.

## Implications of Brexit for Environmental Protection in the UK

At least two [basic scenarios](#) may be envisaged regarding the future relationship of the UK with the EU. Under the first scenario, the UK could preserve its close ties with the EU by, for instance, maintaining its membership in the European Economic Area (EEA). Among other privileges, this scenario would provide the UK with preferential access to the Single Market. As a condition of access, the UK would be subject to a range of EU laws, as well as some enforcement procedures and bilaterally negotiated financial obligations. It should, however, be noted that EEA membership entails only a 'patchwork' of legal obligations in connection to the environment, as it does not cover

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<sup>16</sup> Lee, M (2014) [EU Environmental Law: Challenges, Change and Decision-Making](#) (Hart Publishing), p 160

<sup>17</sup> Jaffey, B and Mehta, R (2013) '[Reigning in the "Prohibitive Expense" of Environmental Litigation: Edwards v Environment Agency](#)', *Judicial Review*, 18(4) 403-415; Westaway, N (2013) 'The Ritz Reformed? Costs in Environmental and Public Interest Cases', *Judicial Review*, 18(4)

the Common Agricultural and Fisheries Policies or nature conservation, but does address aspects of trade in agricultural and fish products, as well as invasive species.

On the other hand, EEA membership would allow the UK to act jointly with EU Member States in various areas of environmental policy (e.g. climate change). Under the second scenario, the UK would remain outside the EU and the EEA. Even so, it is [highly probable](#) that the UK, like any other country wishing to export to the Union, would face pressure to align with European environmental law, at least in areas that are closely associated with access to the Single Market (e.g. compliance with energy efficiency requirements).

By any account, Brexit presents [significant challenges](#) for [environmental protection](#) in the UK, particularly with regard to the loss of scrutiny and enforcement powers associated with the operation of EU law and institutions; the loss of the long-term policy horizon and transparency provided by EU law; the restriction of opportunities for funding and cooperation; and the potential repositioning of the UK in international and regional environmental governance fora. Additional challenges arise for the devolved administrations, whose ability to engage in international cooperation on environmental matters is limited by their lack of international legal capacity. Moreover, in environmental policy areas where EU processes and institutions play a prominent role (e.g. the regulation of chemicals, waste, CO<sub>2</sub> emissions from cars), the repatriation of powers to the UK post-Brexit [raises questions](#) about the allocation of competence between the UK's central and devolved administrations.

On the other hand, the loss of the monitoring and enforcement mechanisms provided by EU law may to a certain extent be mitigated through enhanced private enforcement. To this end, Scotland and England and Wales could seek to further [strengthen procedural](#) environmental rights, allowing individuals and civil society to be more involved in the implementation of environmental law. In addition, the UK may pursue environmental standards akin to those of the EU, thus building upon EU-level guidance and resource pooling. The devolved administrations may also use their [competence in the environmental field](#) to develop standards that are even more ambitious than those of the EU, focusing on the protection of ecosystem services and ecosystem restoration, and taking into account local environmental, socioeconomic and cultural features.

More broadly, the UK can work towards implementing international obligations relating to the ecosystem approach, in acknowledgment of the crucial contribution of ecosystems to the protection of substantive human rights and the realisation of sustainable development objectives (e.g. the UN [Sustainable Development Goals](#)). This is particularly relevant to the agriculture and fisheries sectors, which, as mentioned above, are still facing considerable shortcomings in terms of environmental integration and the implementation of an ecosystem-based approach, despite being heavily reliant on ecosystem services for their sustainable development. In light of weakened accountability systems post-Brexit and the resulting increased importance of national and local enforcement mechanisms, opportunities for continued participation in relevant EU networks should also be explored (e.g. the [European Union Network for the Implementation and Enforcement of Environmental Law – IMPEL](#)).

## Conclusion

The EU's regulatory activities in the environmental field have led to a broad and diverse environmental *acquis* and increased environmental integration across the EU's sectoral and cross-sectoral laws and policies. Although the EU has shown more ambition in some areas than others, its impacts on national environmental laws can be considered substantial. This chapter has highlighted some particular topics of consideration when safeguarding the environment from the UK's withdrawal from the EU – namely, nature protection, environmental integration and procedural environmental rights. As the EU has driven progress in these areas, there is a risk that Brexit could hinder further progress within the UK or even lead to a lowering of the level of environmental protection. However, there are also opportunities to pursue similar or even higher level of environmental protection, which are better catered to the local environmental and socio-economic conditions in the UK's regions.

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# Chapter 12

## Energy Law

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### Development of EU Energy Law

Although two out of the three founding treaties of what is now the European Union (EU) – the 1951 European Coal and Steel Community Treaty (which expired in 2002) and the 1957 [European Atomic Energy Community](#) (Euratom) Treaty – had energy at their heart, EU energy law was limited in its scope and impact until the 1990s, with early interventions largely focused on (nuclear) safety and maintaining security of supply. In general, with energy security being regarded as closely linked to national security, Member States jealously guarded their sovereignty in relation to energy policy, and energy industries were mostly organised on national lines, often as publicly-owned monopolies.

Things began to change in the late 1980s and 1990s as a result of two pressures. First, the desire to complete the EU internal market, by addressing indirect distortions to competition such as energy costs, coincided with a worldwide shift in energy policy away from public ownership and monopolisation towards privatisation and liberalisation. Relying on general competition law and free movement powers, the Commission moved to liberalise downstream gas and electricity markets, initially via a [litigation strategy](#) and subsequently through three successive waves of legislation (in 1996/98, 2003, and 2009).

Second, increasing awareness of the adverse environmental impacts of energy production and consumption, and the cross-border nature of issues such as air pollution and climate change, led the EU to become increasingly active in regulating the environmental performance of the energy industries and the efficient use of energy. Although it was not until 2009, with the coming into force of the [Lisbon Treaty](#), that the EU acquired an express general legal competence in energy policy, this was in effect a belated *de jure* recognition of the EU's *de facto* position as a major policy actor on the European energy stage.

What is now [Article 194](#) of the Treaty on the Functioning of the European Union gives the EU institutions shared competence with Member States to adopt measures to '(a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.' Member State sovereignty over the exploitation of primary energy sources, their energy mix, and the general structure of their energy supply, including the ownership of national energy companies,<sup>18</sup> is expressly preserved. In practice, however, the requirements of both liberalisation and environmental policies increasingly constrain Member States' freedom.

This is a trend which seems likely to continue. In 2015, the Commission launched its [Framework Strategy for an Energy Union](#), with the aim of creating a genuinely cross-border internal market in energy in order to achieve secure, sustainable, competitive

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<sup>18</sup> EU law is technically neutral on questions of property ownership – [Article 345 TFEU](#)

and affordable energy supplies for European consumers. Considerable work is already under way to secure the technical compatibility of domestic energy markets and in late 2016 the Commission proposed another package of legislative measures (the so-called '[winter package](#)') which would further harmonise Member States' energy policies.

## Impact of EU Law on UK Energy Policy

Unlike some other Member States, the UK's energy policy has not been fundamentally shaped by EU energy law. Not only has there been close alignment between the goals of UK and EU energy policy, but the UK has been in the vanguard of European – and indeed global – energy reform since the 1980s, both as regards the liberalisation of energy markets and subsequently in the transition to low-carbon energy systems. In general, therefore, the UK has been a strong supporter – and indeed influential driver – of EU energy policy.

This is not to say that EU law has not sometimes had an impact. For instance, EU state aid law has shaped government support for renewables and, in particular, nuclear generation.<sup>19</sup> The use of so-called 'golden shares' as a means of government intervention in privatised energy companies has been severely restricted by the [CJEU's finding](#) that they constitute a restriction on free movement of capital and the right of free establishment. EU [air quality legislation](#) has largely been responsible for the decline of coal-fired power generation. The imposition of [binding national targets](#) for renewable energy consumption has also significantly accelerated the deployment of renewable energy sources in the UK, particularly in the electricity sector. Overall, though, it is fair to say that EU law has been a constraint upon, rather than a major determinant of, UK energy policy.

However, this does not mean that the role of EU energy law has been unimportant. It has performed two major functions, both of which would be more difficult to replicate outside of the EU. The first is to facilitate trade between, and integration of, European energy systems. Of course, trade would not be impossible outside the EU. Oil, gas and coal are all traded on global markets, subject only to World Trade Organisation rules. But matters are more difficult for electricity and (downstream) gas supply, both of which are networked industries. This means that they depend upon the existence of an extensive infrastructure of wires and pipes to deliver energy from producers to consumers. In the case of electricity in particular, they also require detailed technical regulation to ensure the safe, reliable and efficient operation of the energy system. The EU's institutional framework thus provides a means of reducing transaction costs and technical barriers to trade in gas and electricity by promoting harmonisation of national regulatory frameworks and facilitating common projects, such as the Single (wholesale) Electricity Market (SEM) between Ireland and Northern Ireland, or the proposed North Sea offshore electricity grid.

As already noted, the EU is actively promoting the integration of European energy markets via the [Energy Union](#), and the UK's hitherto rather isolated energy systems are now increasingly physically integrated with other European markets, through the development of interconnectors. Integration makes sense in energy policy terms as a means of ensuring security of supply, in order to increase competitiveness and therefore reduce prices, and to facilitate the deployment of intermittent renewable

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<sup>19</sup> Financial subsidy for the Hinkley Point C nuclear power station is currently the subject of a [dispute](#) before the ECJ

energy sources (by enabling intermittency to be balanced by imports).<sup>20</sup> Given that the UK is a net importer of energy, and the UK government's low carbon ambitions, it has been a strong supporter of market integration within the EU, and this is likely to continue to make sense unless its energy policy objectives change substantially.

The second important function performed by EU energy law is to 'lock in' energy policy goals, by limiting the extent to which policy can change through unilateral Member State action. This has the effect of promoting policy stability – a particularly important concern in relation to the energy industries, which are highly capital-intensive industries operating over long time horizons. In a period, such as the present, of high capital demand – where investment is required both to replace aging energy infrastructure and to facilitate the low carbon transition – policy stability is essential to promote investor confidence. But it is difficult to achieve on a purely domestic basis, given the UK's highly flexible constitutional arrangements and adversarial political system.

The external constraint provided by EU law is also valuable for internal policy actors. For instance, the devolved Scottish government has high ambitions to exploit Scotland's vast renewable energy potential, but limited policy competence within the current devolution settlement to enable it to achieve those ambitions. The policy support provided by EU law therefore gives some guarantee that regulatory powers retained at the UK level will continue to be exercised in a way that supports renewables expansion, as well as, for instance, enables access to EU-level funding for low-carbon investment, and research and development.

Of course, both of these functions performed by EU energy law have their downsides. For instance, as market integration has advanced, regulatory decision-making, particularly in relation to technical market and network operation, has to some extent shifted from domestic to EU-level regulators – ACER (the Agency for the Co-operation of Energy Regulators), ENTSO-E and ENTSO-G (European Network of Transmission System Operators for Electricity and for Gas), which were set up as part of the 2009 liberalisation package. Although UK regulators and network operators are powerful players in these decision-making fora, they are difficult to subject to wider democratic and public accountability at the domestic level (although they are subject to oversight by the European Parliament). Accordingly, the shift of regulatory capacity to the European level may have had the effect of undermining hard-won gains in the accountability of domestic regulators, which were the subject of intense debate in the 1990s.

In addition, while locking-in energy policy promotes stability, it also necessarily makes it more difficult to achieve policy change. This may therefore lock-in policy mistakes. For instance, VAT on domestic fuel was a policy – much criticised at the time – introduced by the Major government in 1993, but EU law meant that the subsequent Labour government was able only to reduce the VAT rate to 5% rather than to abolish it altogether. The UK's reduced rate of VAT on some energy-saving products has also been [held](#) to be incompatible with EU tax law. More fundamentally, EU law locks-in a market-based energy system. Notwithstanding ongoing criticism of the UK's liberalised energy markets, this therefore limits the extent to which new thinking about, for instance, the role of public or community

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<sup>20</sup> For physical reasons, electricity supply and demand must be kept in balance at all times. On the current state of technological development, electricity also cannot easily be stored, hence keeping the electricity system in balance is a major challenge for energy regulators

ownership, the structure of energy markets, or the balance between markets and planning can be pursued.

## **Brexit and UK Energy Policy**

Despite these criticisms, energy policy did not feature significantly in debates leading up to the EU referendum, nor has it done so subsequently. Given the close alignment of UK and EU energy policy, Brexit is unlikely to produce major changes in UK energy policy, at least in the short term, and existing EU-derived market and environmental rules will largely be given continuity of effect via the [European Union \(Withdrawal\) Bill](#). Nevertheless, in addition to the potential general economic effects of Brexit in relation to free movement of workers, availability of investment capital and supply chain impacts, some energy-specific issues do require to be addressed.

### ***Euratom***

The issue here which has attracted greatest attention so far is the implications of Brexit for the nuclear industry. One apparently unanticipated consequence of Brexit is that, in its [Article 50 notification](#), the UK government also gave notice of its intention to withdraw from Euratom, which now shares an institutional framework with the EU. Although [legal opinion is divided](#) on whether withdrawal is legally required, the prime minister's insistence on ending the jurisdiction of the CJEU over the UK makes it politically inevitable.

Euratom currently provides the legal framework for the safe and secure operation of civil nuclear power generation and nuclear waste disposal in the UK, as well as governing the supply of nuclear materials for power generation and other (for example, medical) uses into and out of the Community, the free movement of nuclear workers and co-operation in nuclear research and development. It is therefore essential that a replacement regulatory framework is put in place before the UK leaves the EU in order to comply with international non-proliferation obligations, and to ensure that the nuclear industry can continue to operate.

A new Nuclear Safeguards Bill was announced in the 2017 [Queen's Speech](#), which will transfer regulatory responsibility for safety and security to the (existing) Office for Nuclear Regulation. In addition, the UK government's [negotiating position](#) states its intention to maintain close co-operation with Euratom, as well as to sign new nuclear co-operation agreements with other key nuclear states. However, there [remains some doubt](#) as to whether suitable arrangements can be put in place in time.

### ***Internal Energy Market***

A second key issue concerns the UK's continued participation in the EU's Internal Energy Market (IEM). The [general consensus](#) is that continued participation would make sense for the reasons discussed above, and in particular to secure the future of Ireland's SEM and to avoid disruption and inefficiencies in the operation of interconnectors – a view apparently shared by the [Energy Secretary](#). The EU27 may also favour continued UK participation in the IEM, given that it is already seeking to extend the Energy Union beyond the EU's borders. For instance, Norway currently participates fully in the IEM via the EEA, as do a number of EU candidate countries in south east Europe via the Energy Community Treaty, and Switzerland (in some respects) via a bilateral agreement.



Nevertheless, there are potential obstacles and disadvantages to continued UK participation in the IEM. As regards the former, the UK government's 'red lines' in respect of free movement and CJEU jurisdiction may prove to be insurmountable obstacles, as might be the [European Parliament's insistence](#) that there should be no preferential access to the single market for particular sectors. As regards the latter, continued participation in the IEM from outside the EU would almost certainly mean a loss of influence for the UK in EU regulatory decision-making, making it a rule-taker, rather than a rule-maker. Moreover, the loss of UK influence might change the future direction of EU energy policy in ways which UK governments and regulators might find unpalatable.

### **Green Energy**

If the UK remains part of the IEM, it will continue to be bound by most EU green energy laws, including new obligations in relation to energy efficiency and renewable energy contained in the Commission's [winter package](#). Nevertheless, decisions require to be made on whether to seek to continue to participate in the EU Emissions Trading Scheme (which includes major power generators) and on how to replace EU research and investment schemes for low-carbon energy.

However, if the UK leaves the IEM, green energy is the area in which policy change seems most likely. The current Conservative government is no fan of EU energy efficiency and renewable energy targets, and has already (prior to the EU referendum) withdrawn a range of subsidy and support schemes. Even post-Brexit, the UK will remain subject to domestic and international climate change obligations, as well as internal pressures from the devolved governments. But it is unclear how effective these will be in ensuring the low carbon energy transition remains on track.

### **Conclusion**

The desire to 'take back control' which motivated the decision to leave the EU is one which seems to make little sense in the energy sector. Not only has the UK been a stronger influence over EU energy law and policy than vice versa, but there are persuasive arguments in favour of continued energy market integration. At a time when policy stability is particularly important to the energy industries, Brexit therefore seems like a distraction. However, it remains to be seen how far 'business as usual' will be possible post-Brexit, or alternatively how any new policy flexibility will be used in practice.

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## Chapter 13

# Police and Judicial Cooperation in Criminal Justice

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### Legal Background

The provisions concerning police and judicial cooperation in criminal matters are included in Title V of the Treaty on the Functioning of the European Union (TFEU). This part of the treaty is devoted to the Area of Freedom Security and Justice (AFSJ), which consists of rules on judicial cooperation in civil justice, asylum and immigration, police and judicial cooperation in criminal matters (PJCCM). PJCCM is included in Chapters 4 and 5 of Title V.

On the basis of these provisions, and the corresponding ones in previous treaties, the EU has adopted many instruments, mainly in the following areas:

1. Approximation of rules of substantive and procedural criminal law;
2. Instruments of “mutual recognition”, a cornerstone principle of judicial cooperation in criminal matters within the EU. Mutual recognition in criminal matters means that a judicial order issued by Member State (MS) A and addressed to MS B, must be recognised and executed in MS B without further formality, except when grounds for refusal apply;
3. Police cooperation. Measures in this area can be grouped into two main clusters: information exchange (such as the Decision on exchange of information to prevent terrorist offences) and operational cooperation (such as the Framework Decision regulating the setting up of Joint Investigation Teams);
4. Establishment of specialised EU agencies (e.g. Europol and Eurojust).

In order to understand how Brexit impacts on the UK – also taking account of the devolution settlement – it is helpful to divide the above categories of EU instruments into two types: static and dynamic instruments. *Static* instruments are those that do not involve interaction with other Member States or participation in multilateral agreements. In other words, they are instruments that must be given effect within individual domestic legal systems. Examples of static instruments (falling under Category 1 above) are directives which define certain criminal activity and attached penalties (e.g. [Directive 2011/93/EU](#) on the sexual exploitation of children) and directives which outline elements of criminal procedure to be implemented by Member States (e.g. [Directive 2012/13/EU](#) on the right to information in criminal proceedings).

*Dynamic* instrument are those that do entail some form of interaction with other Member States or participation in multilateral arrangements or agreements. A classic example of this would be the flagship EU criminal justice (mutual recognition) instrument known as the European Arrest Warrant ([Framework Decision 2002/584/JHA](#)), but other examples include the legislation establishing agencies

such as [Europol](#) and [Eurojust](#). All dynamic instruments are built around some form of agreed co-operation across borders.

## The UK's Place in EU Police and Judicial Cooperation

All of the above measures form part of an integrated system to tackle crime in and across the EU, but the UK does not participate fully in PJCCM. The UK currently retains a very distinctive and privileged position that allows it to pick and choose which instruments to adopt from a default *opt-out position*. In light of transitional arrangements applicable to the AFSJ agenda as defined in the [Lisbon Treaty](#) (2009), a distinction must be drawn between PJCCM instruments adopted *before* and *after* the Treaty of Lisbon.

In December 2014, the UK exercised its bespoke right to opt out *en masse* from all of the 130 PJCCM pre-Lisbon instruments it had previously signed up to. It then had a right to opt back in to any individual instruments, and it did so in relation to 35 of them. Although this number may seem small, among these are the legal instruments widely regarded as key instruments within the agenda, including the Framework Decision on the European Arrest Warrant. As for the instruments adopted *after* the Lisbon Treaty, the default position is that the UK does not take part in the measures concerning police and judicial cooperation, but it can opt-into any of these measures on a case-by-case basis, either at proposal stage or after their adoption.

The UK has opted in to quite a number of these since 2009 – and even since the Brexit referendum! - , such as the directive on the [European investigation order](#) and the 2016 [Europol Regulation](#). Some PJCCM measures are also agreed within the EU's [Schengen framework](#) and, while the UK does not participate in the Schengen area, it may request to take part in some or in all of the provisions of the Schengen *acquis*. In general, the UK participates in those parts of the Schengen *acquis* relating to crime and policing. See [this summary](#) of the legally-binding protocols detailing the UK's special position and the current state of play in terms of opt-out and opt-ins).

It is clear from the above that the UK's position vis-à-vis EU police and judicial cooperation is peculiar. Although it does not participate fully in this agenda, it has *chosen* to participate in very many key elements of it, clearly judging it to be in the national interest to do so. Certainly, withdrawal from the EU does not lessen the security threats faced by the EU or the UK – in fact, it might increase them if the UK is not a partner in operational cooperation mechanisms, including, for instance, intra-EU sharing of data. It is hardly surprising therefore to see the UK government expressing the desire to continue to work with the EU to preserve UK and EU security, and to fight terrorism and uphold justice across Europe (see the [Brexit White Paper](#), from p 61). Precisely what this means in terms of which PJCCM measures and initiatives it will seek to continue to participate in – and how those requests will be received by the EU27 – remains to be seen.

As the UK government grapples with the impact of Brexit on this agenda and considers its negotiating strategy with the EU, it should be mindful of the current domestic arrangements in relation to some of these issues. An added layer of legal (and consequently, operational) complexity – not to be forgotten – exists as a consequence of the independent system of criminal justice in Scotland and the devolution settlement. In Scotland, in broad terms, criminal law and enforcement (policing) are devolved competences. However, some aspects of this are specifically reserved under the Scotland Act, including: misuse of drugs, data protection,

national security, interception of communications, official secrets and terrorism and extradition. So, essentially, implementing aspects of EU law on crime and policing in the UK might involve action by authorities south or north of the border or, in some cases, both.

Combatting terrorism is a good example of an EU objective that demands specific actions from authorities north and south of the border and also cooperation between them. Terrorism is a wide and transversal category that includes many crimes and police powers. It is clear that a range of competences are engaged, some of which are reserved and some of which are devolved. Counterterrorism policy and legislation is reserved to the UK government, but many aspects of preparation, prevention and dealing with the consequences of a terrorist act in Scotland would be managed and controlled by the Scottish government and local agencies. Practical cooperation north and south of the border on these matters has been good to date – for instance, the Scottish government is engaged in a range of activities to address the threat, which integrate with the UK government's overarching counterterrorism strategy, known as 'CONTEST'.

Given the different policing and criminal justice systems north and south of the border, mechanisms of operational cooperation have been established to ensure that criminals cannot take advantage of these differences as they enjoy *internal* free movement within the UK. For instance, in relation to matters of international mutual assistance (which engages both devolved and reserved matters) and in the interests of ensuring a consistent approach and effective operational cooperation across the whole of the UK, the Scottish Parliament passed authority back to the Westminster Parliament to legislate on behalf of the entire UK – for instance, with the [Crime \(International Cooperation\) Act 2003](#).

It could legitimately be argued that EU law has brought a framework and obligations of *international* cooperation in the fight against crime to the UK, which to some extent makes domestic and internal cooperation an imperative. In the absence of this EU framework, it remains to be seen what impact, if any, there will be on the degree of cooperation and convergence on crime and policing matters north and south of the border post-Brexit.

Looking more closely at the EU legal *acquis* on PJCCM, the distinction between static and dynamic EU instruments mentioned earlier will help us to understand how leaving the EU impacts on Scotland and the UK. Static instruments are those that do not involve – directly or indirectly – interaction with other Member States or participation in multilateral agreements – so upon implementation, they become domestic law, and they can at least in principle, remain so, after Brexit. For Scotland, it is then important to see if any of these static instruments have been implemented in Scots law, because they relate to a devolved matter. Pursuant to the proposed provisions of the EU (Withdrawal) Bill, such implementing devolved legislation would be retained on Brexit day but repatriated to Westminster, at least until a further decision is made by UK government ministers to effectively 're-devolve' them. The latter decision should happen, as one could make a strong argument that 'common UK frameworks' do not need to be devised in relation to such static criminal justice measures. They have not existed to date; where co-operation north and south of the border is needed, it has been forthcoming. The following examples are illustrative: [Directive 2012/29/EU](#) establishing minimum standards on the rights, support and protection of victims of crime, is implemented in Scots law by amendments to [Victims and Witnesses \(Scotland\) Act 2014](#) and Scottish Statutory Instrument 2015 No 444 –

The Victims' Rights (Scotland) Regulations 2015. In basic terms, static instruments can be identified in the police and judicial cooperation categories set out of substantive criminal law (i.e. definitions of crimes) and criminal procedure.

What then, of the more numerous and wide-ranging 'dynamic' instruments? Such measures are predicated on some level of cross-border/international cooperation and so domestic political will or legislation alone is not enough to make them work. On Brexit day, they might technically be 'retained' under the terms of the EU (Withdrawal) Bills but they simply cannot work properly unless other Member States also agree to continue to commit to them. Of the broad categories of EU police and judicial cooperation identified at the outset, mutual recognition, exchange of information and participation in EU agencies necessarily require some cooperation with other states.

What then is at stake? In short, a great deal! Unless agreed otherwise as part of negotiations on the future relationship between the EU and UK, Brexit will have the concrete consequence of the UK being excluded from the whole raft of EU cooperative mechanisms on criminal justice and policing and surveillance – all of which the UK has specifically chosen to participate in. Indeed, the March 2017 House of Commons Justice Committee report, [\*Implications of Brexit for the Justice System\*](#), emphasises the importance of the UK's close involvement with the EU in criminal justice matters to security and safety of citizens of both the UK and the rest of the EU. It concludes that continued criminal justice cooperation is a critical priority for the Brexit negotiations, particularly in three areas: extradition agreements, investigative resources, and information sharing.

It is noteworthy that EU databases and laws that enable the exchange of information between EU member states and between the third countries – and which relate to (suspected) criminal activity – are predicated on compliance with EU data protection rules. The UK has signed up to such databases and rules to date and, if it wishes to continue to reap the security benefits of EU co-operation after Brexit, it is likely that compliance with EU fundamental rights protection, part of which it is currently at liberty to disregard under its opt-outs as an EU Member State, will be required.

While domestic legislation derived from EU 'static' instruments could in principle be retained (or amended or repealed) following Brexit, again, unless agreed otherwise, EU law would no longer be an enforceable source of law in the domestic legal system after Brexit, and access to the EU law remedies would not be available.

## Possible Perspectives

There are, as yet, no definitive answers on what life after Brexit in Scotland or the UK will be. In order to understand better Scotland's scope to retain current EU law in this field, one might usefully identify the EU measure at stake as either static or dynamic. In the latter case, the UK Government will need to negotiate some form of agreement with the EU to enable continued operation of such instruments. Scotland has a stake in this given its independent criminal justice system and should be ready and able to cooperate with the UK on this, in order to feed into the UK negotiations. If, however, the measure is a static one, one might consider whether it falls squarely into a reserved or devolved matter or whether it touches on both – in which case, the need for cooperation (legal and operational) is obvious, if loopholes are not to be exploited by criminals and protections are to be fully enjoyed.

A good example of this possible overlap between reserved and devolved matters is the regulations whereby the Scottish parliament implemented the EU directive on the right to information in criminal proceedings – [Scottish Statutory Instrument 2014 No 159 – The Right to Information \(Suspects and Accused Persons\) \(Scotland\) Regulations 2014](#). These regulations apply to Police Scotland, but do not apply to those authorities carrying out reserved functions. Since revenue and customs are reserved matters, people arrested by HM Revenue and Customs (HMRC) in Scotland fall outside the scope of The Right to Information Regulations.

In order to ensure effective application of EU law across the UK, the UK government therefore issued a code of practice regarding (HMRC) criminal justice working practices for suspects in Scotland only, concerning the right to information in criminal proceedings. Such examples of competence overlap, which create the need for operational cooperation north and south of the border to ensure effective crime fighting, criminal justice and the appropriate enforcement of rights, are not likely to disappear when the UK leaves the EU.

In terms of possible developments, Brexit could result in significant regression for both the UK and the EU. The current dynamic instruments will have to be amended and substituted. This will require negotiation. While Scotland's margin for autonomous action is limited, it could surely have a say in terms of promoting possible priorities and negotiating positions for the UK – this would also facilitate continued good relations in terms of internal cooperation in relation to crime and security.

There are three possible legal scenarios concerning the UK's relationship with the EU in the field of criminal justice after Brexit:

1. The establishment of EU-UK agreements on various aspects of the agenda. There are at present EU-third countries agreements on judicial and police cooperation, agencies, databases;
2. The conclusion of bilateral agreement between the UK and individual EU member states;
3. 'Back to Square 1' option. In the absence of agreements outlined in (1) or (2), the UK could fall back on relevant instruments adopted within the Council of Europe (CoE), to the extent that they exist (largely in relation to mutual recognition – i.e. not operational policing or data exchange).

It should be noted, first, that these scenarios are not mutually exclusive. Second, it should be made clear that with each of the scenarios come pitfalls. There are limited existing examples of the EU negotiating treaties with third countries on specific matters (e.g. a form of the European Arrest Warrant for Norway and Iceland, although not yet in force, and an extradition treaty with the USA), but no such treaties have been agreed with any non-EU countries on the large majority of EU criminal law mutual recognition measures. Of the treaties which have been agreed, not a single one goes as far as the relevant EU legislation in force. By definition, bilateral agreements are limited in the context of transnational crime: the criminal and his or her assets are not always in the state that you think they are, so gaps will necessarily arise in *inter alia* intelligence and operational capabilities. Where CoE instruments exist, they are less detailed and often less effective.

It will continue to be in the mutual interests of the UK and the remaining EU Member States to cooperate in criminal justice and security matters post-Brexit, but the

mechanisms and forms available for such cooperation are likely to be reduced. It is difficult to see how a more favourable arrangement than currently exists is possible, with the consequent risks to safety and security for all of us.

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# Chapter 14

## Human Rights Law

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The European Union's original focus was on economic integration among the six founding Member States. The task of securing human rights at a supranational level had been entrusted to the [Council of Europe](#), which oversees and operates the [European Convention on Human Rights](#) (ECHR) and its associated Court, the [European Court of Human Rights](#), situated in Strasbourg. The ECHR remains the key instrument in Europe for the protection of human rights. At the same time, the EU has, over time, developed a framework for the protection of human rights which, in part, overlaps with the ECHR but also differs in significant ways.

### European Convention on Human Rights

From its inception in 1950, the ECHR has been the central instrument, and the Council of Europe the central body, for the promotion and protection of human rights in Europe. The rights in the ECHR include the right to [respect for private and family life](#), the [right not to be tortured](#), the [right to freedom of assembly](#), and the [right to freedom of speech](#). The ECHR is incorporated into UK primary legislation by virtue of the [Human Rights Act 1998](#) (HRA), whose provisions are binding on all acts of 'public authorities' (s. 6(1)).

Where an Act of Parliament (UK) is contrary to the provisions of the HRA, higher courts can make a 'declaration of incompatibility' under s. 4. This leaves the Act of Parliament intact, but serves the purpose of pointing out that the legislation is problematic in human rights terms and gives parliament the opportunity to rectify this. The HRA (s.10) also provides for a fast-track procedure to remove the incompatibility by way of a remedial (ministerial) order if there are compelling reasons for this. Section 29 of the [Scotland Act 1998](#) provides that an Act of Parliament (Scotland) which is contrary to the provisions of the HRA is considered to be invalid and not law. The same applies to legislation from the other devolved parliaments.

### EU Human Rights Framework

In 2000, the EU adopted the initially non-binding [Charter of Fundamental Rights](#) (CFR). The CFR entered into legal force in 2009. [Article 51\(1\) of the Charter](#) addresses its provisions to the institutions and bodies of the EU, with due regard for the principle of subsidiarity and to the Member States only when [they are implementing](#) Union law. This has been interpreted broadly by the CJEU to mean 'acting within the scope of EU law'. Where domestic law, including Acts of Parliament, is found to be incompatible with the charter it should be 'disapplied'. An example of where this has happened can be found in the recent case of [Benkharbouche v Embassy of Sudan](#).

The CFR sets out the full range of civil, political, economic and social rights of EU citizens and of all persons resident in the EU. As part of the EU's constitutional law, the CFR reaffirms those provisions which exist elsewhere in EU law and which originate from a range of sources, including the general principles of EU law, the

constitutional traditions and international obligations common to the Member States and the ECHR's provisions. As a result, the CFR is broader than the ECHR in terms of the rights that it protects. For example, the charter features an express [right to data protection](#), which under the ECHR can only be protected as part of the right to private life. In addition, the charter contains important additional protections, in particular in the field of anti-discrimination law, with its stand-alone [anti-discrimination provision](#), and in the area of social rights.

## The EU's Accession to the ECHR

Under [Article 6\(2\)](#) of the Treaty on European Union, the EU is legally bound to accede to the ECHR. This is to enable the establishment of a coherent framework of human rights protection throughout Europe. In April 2013, the 47 Member States of the Council of Europe and the EU finalised a draft Accession Agreement of the EU to the ECHR. However, in fulfilling its obligation under [Article 218\(11\) TFEU](#) to deliver an opinion on the draft agreement's compatibility with EU law, the European Court of Justice, in its [Opinion 2/13](#), found that the draft agreement did not provide sufficient protection of the EU's specific legal arrangements and the Court's exclusive jurisdiction.

At the time of writing, no new agreement has been drafted, but both the Parliament and the Commission continue to promote the need for EU accession. If and when a new draft agreement is negotiated, EU accession will depend on ratification, not only by EU Member States, but also the states party to the convention, as well as the consent of the European Parliament under [Article 218\(6\) TFEU](#). In its current [work programme](#) for 2017, the Commission announced that it will continue its work on accession, taking 'full account' of the Court's opinion.

## Impact of Brexit on Human Rights in the UK

Human rights law in the UK stems primarily from the ECHR, which has been written into domestic law through the Human Rights Act 1998. This means that the fundamental rights protected by these laws will not change upon exiting the EU, in whichever form that may take. Under the [European Union \(Withdrawal\) Bill](#) in its current form, the charter will be explicitly [removed from UK law](#) on Exit Day. This has been criticised on the basis that it weakens [substantive human rights](#) protections for those living in the UK, particularly where their protections would not be available under the ECHR. However, retaining the charter in domestic law [would not be straightforward](#) as, if Brexit results in the UK leaving the EU legal order so that EU law no longer applies, it would be difficult to see how the charter could have any direct impact if EU law was no longer enforced or enforceable, particularly as its application is limited to when Member States are implementing EU law.

Following this, human rights protections in the UK would be solely rooted in the ECHR and the Human Rights Act. Although many rights can currently be enforced under the ECHR/Human Rights Act provisions, there is evidence that charter rights can be used more effectively in certain cases, particularly those in which the ECHR would not have any impact. The *Benkharbouche* case provides an example of the negligible impact that the ECHR would have in such circumstances in the UK. The Human Rights Act does not contain the right to an effective remedy, and so the right could not be enforced before the domestic courts. In situations where the charter would apply, such as in this case, the strength of the charter is greater than the

ECHR, because the rights under the charter could be applied in preference to domestic law.

However, this is restricted to particular circumstances: the issue would need to concern the enforcement of EU law and a charter right would need to be engaged. As many human rights issues, such as the [right for prisoners to vote](#), do not concern EU law, the charter would not provide any greater or more effective protection than the ECHR. Because of this, the loss of the charter would only mean the loss of certain rights which could be enforced more effectively in particular circumstances.

## Scotland and Human Rights

In contrast with equality, which remains largely reserved (see the [Equality Law](#) chapter) under the current devolution settlement, human rights are a devolved area and are given legal effect by the Scotland Act 1998, section 57(2) of which provides, 'A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights'. This ensures that Scottish-specific provision cannot fall below the minimum standards guaranteed by the ECHR, although it is possible to go beyond those standards.

In order to fully understand the protection of human rights in Scotland, the relevant provisions of the Scotland Act must be read alongside the Human Rights Act 1998 with its application across the UK. However, it is worth noting that the human rights provisions of the Scotland Act 1998, which entered into force before the HRA, go beyond that act in protecting convention rights. Section 29(2)(d) provides that an Act of the Scottish Parliament is outside its competence if it is incompatible with the convention rights. Therefore, although the courts cannot invalidate Acts of the UK Parliament, they can invalidate Acts of the Scottish Parliament. The Scotland Act also gives the courts more power over Executive action.

Scotland has its own [National Human Rights Institution](#), the [Scottish Human Rights Commission](#) (SHRC), which is charged with promoting and protecting human rights for everyone in Scotland. In December 2013, the Scottish government, in partnership with the SHRC, launched [Scotland's National Action Plan for Human Rights](#) (SNAP). SNAP, which is independently monitored, brings together civil society, the Scottish government and public bodies in a collaborative programme of action to build a stronger human rights culture in Scotland.

In its current policy on human rights, the Scottish government makes a number of pledges, including opposing the [UK government's proposals](#) to replace the Human Rights Act with a 'British Bill of Rights', [promoting human rights internationally](#) by working with other countries and [fulfilling its international obligations](#). As the negotiations on Brexit develop, it is possible that Scotland might seek to be distinctive in this respect, through the promotion of its international commitments. The redrafting of a renewed strategy in 2017 offered by the end of SNAP's current lifecycle might provide added impetus in this regard.

## Conclusion

The effect of Brexit on human rights law in the UK can concern only the Charter of Fundamental Rights, as the ECHR is governed by a body distinct from the EU. The rights within the CFR mirror many fundamental rights as contained within the ECHR,

and go beyond the ECHR in the areas of social, economic, and labour rights. The reach and use of the CFR in the UK is restricted to the application of EU law. However, given the influence that EU law has had on British law, removal of the CFR will undoubtedly weaken human rights law in the UK in certain areas. The current devolution arrangements could offer the Scottish government the opportunity to develop a distinctive policy programme for Scotland in this context.

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# Chapter 15

## EU External Relations

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The European Union has extensive competences to engage with the world beyond its borders. Therefore, the UK's own relationships with non-EU countries are deeply embedded in the EU institutional framework, and the process of Brexit will require substantial legal reform in the UK. The term 'external relations' in fact covers an extremely wide set of policies which rely on a diverse set of legal competences. For this reason, we tend not to use the term 'foreign policy' unless this refers to the 'political' as opposed to 'economic' aspects, though even these are not always easily separated.

'External relations' is taken to cover the Common Commercial Policy, the powers of the EU to make agreements with 'third' – i.e. non-EU – countries, neighbourhood policy, development policy, relations with international institutions and what is known as the 'external dimension of internal policies'. The latter refers to a long-standing legal principle set out by the Court of Justice in Case 22-70 [AETR](#), under which the EU has implied external competence where it enjoys internal competence. In addition to the wide variety of external competences which are scattered throughout the treaties, the legal instruments and institutional arrangements which apply across these areas are not the same throughout. This makes external relations a particularly complex area which the UK will need to extract itself from. We will address two of the main focal points of EU external relations: the CCP and the CFSP.

### Common Commercial Policy (CCP)

#### *Introduction*

The EU Internal Market is premised on a common customs union aided by the free movement of goods, persons, services and capital (see the [\(External\) Trade Law](#) chapter). Whilst there is no single EU commercial *law*,<sup>21</sup> the CCP (found in [Articles 206-207 TFEU](#)) is an example of exclusive competence ([Article 3\(1\)\(e\) TFEU](#)), meaning that the UK and the other Member States are precluded from making individual agreements outside the EU framework. The Preamble to the original Treaty of Rome stated that the Contracting States 'desir[ed] to contribute, by a means of a common commercial policy, to the progressive abolition of restrictions on international trade.' The process of making international agreements is in [Article 218 TFEU](#). After the Treaty of Lisbon, investment is now included in the scope of the CCP.

#### *Scope*

The EU's Common Commercial Policy is now contained in [Article 206](#) and [Article 207](#) TFEU. Article 3(1)(e) explicitly confirms the exclusive competence of the EU, codifying the consistent case law of the CJEU to this effect. Article 206 confirms that

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<sup>21</sup> The closest being the European Commission's [Proposal for a Common European Sales Law](#), COM (2011) 635 final

the European Union's contribution vis-à-vis world trade through: the 'progressive abolition of restrictions on international trade and on foreign direct investment and, and the lowering of customs and other barriers'. In practice, the European Parliament and Council 'authorise' negotiations, whilst the European Commission is responsible for 'conduct[ing]' negotiations for such agreements (Article 207(3), Paras 2-3, TFEU). The European Council has an important role in the negotiations where such agreements impact upon internal rules relating to a range of services which may affect Member States' cultural diversity or where trade arrangements affect the delivery of essential services (Article 207 TFEU).

### **Objective**

The Common Commercial Policy equips the EU with competence to [negotiate services](#) and enter into international investments with countries external to the EU. The Common Commercial Policy broadly focusses on international trade agreements between [the EU and third states](#), and agreements on foreign direct investment. The Policy covers a range of commercial areas. These include rules governing [anti-dumping](#), [import](#) and export controls, [foreign direct investment](#), [procurement](#), the [export](#) and most recently the [import of cultural goods](#). The Policy is a key driver towards the EU establishing international investment agreements in the future. The Policy has a political as well as an economic objective. In response, the EU institutions recognise that action under the Common Commercial Policy must take account of [security in exports](#), [human rights](#), [environmental standards and climate change](#), and [corporate social responsibility](#).

### **Future**

The EU will continue to develop and implement its Common Commercial Policy with third states. However, the future success of the CCP will depend on a combination of three things. First, Brexit – the consequences for the UK in leaving the EU, and with it the CCP, are considered below. However, for the EU, the negotiations for the UK's departure will provide an insight as to how the EU will treat the UK as a third state in future. The EU continues to stress that a future trade arrangement or agreement with the UK is dependent on the latter retaining internal market and customs union membership, if the UK wishes to enjoy the benefits of these. This also means maintaining the adjudicative authority of the Court of Justice of the EU (CJEU). The UK is seeking to secure [bilateral trade arrangements](#) with the EU and third states, including agreement on binding arbitration. However, at the time of writing, any agreements between the UK and the EU on free trade will not be [considered by EU negotiators](#) until the UK has left the EU.

Second, the process of implementation of the EU's recent free trade agreements with Canada and Singapore may provide an indication as to the extent – perceived or actual – of the EU's future influence on free trade, foreign direct investment and investment arbitration agreements. This point is particularly pertinent given the apparent rise in protectionism promoted by President Donald Trump in the US, and the interpretation in many parts of the globe that the UK (via the Brexit vote) has turned away from its traditional emphasis on free trade. Third, the political ambitions of the EU in furtherance of internal financial integration and enlargement will be

important.<sup>22</sup> The ability of the EU to undertake bilateral treaties on behalf of its Member States is crucial to supporting further enlargement through increasing market access to new accession states and vice versa.

### ***Common Commercial Policy and Brexit***

The CCP was possibly the only area of external relations which was prominent in the referendum debate, generally characterised as the rights of the EU institutions to make ‘trade deals’ on behalf of the EU as a whole. The CCP had been strongly supported by successive UK governments, given the collective weight of the EU acting as a whole. It is therefore surprising that the CCP was portrayed in a rather negative light in the referendum campaign and the subsequent negotiations. The EU institutions, particularly the Commission, have developed extensive expertise in trade negotiations. The Member States, including the UK, have ‘fed into’ the process of negotiations to ensure that the EU position reflects national positions. Brexit therefore means that the UK will no longer be part of the agreements – or the negotiations.

As with other dimensions of EU law, the institutional competences are not always straightforward. For many years, questions have been raised about agreements with third countries which go beyond the parameters set out in the CCP. These are termed ‘mixed agreements’. Since the Brexit vote, the CJEU gave an [opinion](#) on the Free Trade Agreement (FTA) between the EU and Singapore which stated that where aspects of agreements are based on shared competences, then the Member States need to be involved. This matters for Brexit, since future agreements with the EU will straddle a variety of competences.

The best known recent examples of agreements under CCP competences are the EU-Canada agreement (‘CETA’) and the EU-US agreement (‘TTIP’) neither of which is in force and both of which have proved controversial. Whilst leaving the EU would, in theory, free the UK from the often cumbersome procedures of negotiating an agreement with another country that has to satisfy 28 Member States, the UK would nevertheless have to discuss terms with the other party.

An analysis by the *Financial Times* suggests that there are an [estimated 759 agreements](#) which are currently operated by the EU and, though not all were concluded under the CCP, all will need to be renegotiated and replaced by the UK, simply to remain in the same position. These range from comprehensive free trade agreements with countries such as Vietnam, Mexico and South Korea, to technical, sectoral agreements with countries across the globe. Although the UK is a member of the WTO, it joined as a member of the EU and there is some debate about whether the transfer of competences would require the assent of the other WTO members.

By leaving the EU and the single market, the UK will no longer be a party to these agreements. The UK government’s current approach is to try to ‘cut and paste’ EU agreements and replicate the text of the agreements with the respective third countries for agreement. But this is also dependent on the agreement of the third country and any domestic legal process they must go through. There are also major

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<sup>22</sup> On enlargement, the accession of Croatia to the EU has resulted in a number of proposed Council Decisions for Economic Partnership Agreements or Partnership and Cooperation Agreements with third states: see [COM \(2017\) 382](#), [COM \(2017\) 81](#), [COM \(2017\) 82](#)

practical difficulties in negotiating agreements from scratch for the UK, which does not employ the number of specialists and negotiators needed.

Once the UK has left the EU, it will be able to seek individual agreements with third states but, whilst it continues to be a member of the EU, it cannot formally start this process since it would be contrary to EU law. Although it is perhaps unlikely that the Commission (or other Member States) would seek to enforce EU law to prevent the UK doing so – the ability of the UK to, at the same time, negotiate with the EU on the exit agreement and enter into detailed discussions with states across the globe is a practical impossibility.

## **Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP)**

The CFSP was incorporated into the law of the EU by the Treaty on European Union in 1992. However, it has always had a ‘special’ character within the treaty arrangements. Before the Treaty of Lisbon, it was the second of three ‘pillars’ of the EU’s legal order: the first being the Community pillar, which contained the law on the single market, competition, and environment, and which used the familiar regulations and directives. Such legal instruments do not apply in the CFSP. It has generally been regarded as an area of ‘intergovernmental’ cooperation, rather than ‘supranational’ integration. Although the Treaty points to the CFSP covering ‘all areas of foreign policy’, in reality there is not the same pooling of sovereignty as in other areas.

Successive UK governments have resisted any attempts to allow the CFSP to become less intergovernmental. Partly this can be explained by the UK’s belief in the value of the EU as a trade-focused polity, which provided its motivation for eventually joining the club. But also because of the UK’s own long-standing place on the global stage, as demonstrated by its permanent UN Security Council seat, role in NATO and close alliance with the United States and, to a lesser and declining extent, countries of the Commonwealth. Unlike smaller EU states, the UK has seen no need to use the CFSP as a means of gaining visibility in international affairs (though this does not preclude the ability to use the CFSP to amplify national foreign policy, as discussed below). The UK has consistently expressed a constant fear from the outset that the institutionalisation of the CFSP would be used as a means of usurping national foreign policy.

In Prime Minister [Theresa May’s letter](#) to European Council President Tusk which triggered [Article 50 TEU](#) of 29 March 2017, there was no mention of the words ‘foreign policy’. However, the following extract gained significant attention:

We want to make sure that Europe remains strong and prosperous and is capable of projecting its values, leading in the world, and defending itself from security threats. We want the United Kingdom, through a new deep and special partnership with a strong European Union, to play its full part in achieving these goals. We therefore believe it is necessary to agree the terms of our future partnership alongside those of our withdrawal from the European Union.

These words were taken in some quarters as the UK using its relative military and security/intelligence strengths as a means of threatening the EU to offer a ‘good’ exit deal. The EU’s [negotiating guidelines](#) for Brexit note that, ‘The EU stands ready to establish partnerships in areas unrelated to trade, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy.’



The framing of ‘areas unrelated to trade’ clearly demonstrates that the CFSP, including defence, are not likely to be the primary areas for discussion (or indeed difficulty) during the Brexit negotiations. Indeed, the categorisation of foreign policy here as the ‘other’ suggests that CFSP is not an area where the EU expects great attention to be devoted.

In September 2017, the UK government published a [position paper](#) on Brexit’s implications for foreign policy, defence and development. In theory, this should be less problematic than in many other areas: since diplomatic missions, armed forces and even policy statements have remained separate from the CFSP and European External Action Service, the ‘extraction’ from the EU should not entail lengthy debates. The paper stresses the shared challenges the UK and EU face and the desire to work as closely together as possible after Brexit.

There are nevertheless important and potentially complex issues to resolve and which, in addition to the points raised above, connect the CFSP to policies on aid and development, trade, sanctions, climate change, and energy, all of which rely on overlapping competences in the treaties. Therefore, whilst it might be debated what the ‘law’ in CFSP consists of, there is little doubt that the regular ‘law’ in other dimensions of integration will not make extraction from the CFSP straightforward in reality.

A particular headache is the imposition of restrictive measures (sanctions), of which there are over 30 in place. These depend on measures taken under the CFSP, followed up by a regulation. They include measures placed by the EU on countries such as Russia and individuals suspected of funding terrorism. The UK will need to find a way to replicate these, which will also depend heavily on the relationship – should there be one – between the UK and EU single market and/or customs union, and whether this is a temporary or permanent solution. Restrictive measures are therefore one extremely diverse category which represents a highly complex legal issue to be resolved, in addition to the administrative, budgetary and operational issues of the CFSP. There is also a link between foreign policy and information sharing within the EU context which would require an agreement on cooperation to continue (see the [Police and Judicial Cooperation in Criminal Justice](#) chapter).

The situation that the UK and the EU find themselves in is thus unprecedented. Furthermore, there is no obvious model upon which future EU-UK relations regarding the CFSP can easily be based. Much depends on the political will of the two sides to decide to work on areas of common interest, which would therefore provide an impetus to resolve the institutional questions. This is dependent of course on the UK’s own vision of a ‘Global Britain’.

Whitman identifies [three possible scenarios](#) for the UK in the CFSP post-Brexit: as an ‘integrated player’, ‘associated partner’ or ‘detached observer’. In the first, the UK would have a bespoke, special status in which it would retain involvement in battlegroups, CSDP operations (as a ‘reverse Denmark position’) and participation in the Foreign Affairs Council for relevant matters. But, of course, it would be outside the mainstream fora for discussion and strategic direction.

As an ‘associated partner’, its position would be closer to that of Norway, having no membership of the Foreign Affairs Council but a ‘dialogue’ on related issues. Whilst it would still have the opportunity to participate in battlegroups and the European Defence Agency via specific agreements, this would appear to be a functional

arrangement with little or no influence over policy-making. At the lowest end of the scale, a 'detached observer' would mean that the UK would not participate in any institutional formats and would probably be limited to participation in civilian missions on a case-by-case basis.

In any of these scenarios, Brexit means that the UK would lack any capability to steer the direction of the CFSP. Even being free of the 'political baggage' of being too closely associated with EU missions in this area of closely guarded national sovereignty, we do not yet know to what extent the UK could conceivably play a constructive role and how receptive the rest of the EU27 will be. As Dijkstra has [noted](#), the operational, technical and administrative implications cannot be fully considered until the 'big picture' political questions are settled.

At the meta-level it might, in theory, be possibly for a joint dialogue between the UK and EU on an agreed strategic approach to foreign policy. However, this would seem to be counter-intuitive to the purpose of Brexit and the mantra of 'taking back control' which was so prominent in the referendum campaign. Since the effectiveness of placing resilience at the core of EU foreign relies on the coherence of the EU's institutions, instruments and policies, an agreed approach with an outsider would not seem the opportune means to do this.

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### **Balance of Competences Review – External Relations**

- [Foreign Policy](#)
- [Trade and Investment](#)
- [Development and Humanitarian Aid](#)

### **For a comprehensive reading list of new and older works of security and defence**

Kienzle, B and von Weitzershausen, I (2017) [Brexit Reader in Security and Defence](#)

### **Videos**

External Relations and Brexit – Short films by Paul James Cardwell before the EU referendum:

- [Democracy Promotion](#)
- [Sanctions](#)
- [External Migration](#)

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# Chapter 16

## (External) Trade Law

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### From *Internal Market Law* to *External Trade Law*

Thinking about the law in context here, it is important to remember that trade law means *trade*: that is, products and to some extent services, being bought and sold. Given the materiality of products, global trade patterns tend to coalesce around three large geographical blocks: Asia and the Pacific; the Americas; and Europe. The idea that the UK will easily replace trade within the European block with trade outside of that block has been said to '[defy gravity](#)', though the models on which such predictions are based are [contested](#). It is clear though that the UK will continue to [trade with the EU](#) post-Brexit.

This means that what we now think of as *internal market law* – free movement of goods, freedom to provide and receive services, freedom of establishment, free movement of capital, and perhaps even some aspects of free movement of labour – will become *trade law* once the UK leaves the EU. External trade law may also cover some regulatory standards in fields such as product safety, recognition of qualifications, labour or environmental standards.

In other words, trade between the UK and the EU will be governed by whatever agreements there are between the EU and the UK. These could include:

- The Withdrawal Agreement
- Any transition agreement(s)
- Any future EU-UK trade agreement(s) – which could be of various types, such as:
  - EEA membership
  - Association Agreement
  - 'Deep and Comprehensive' Free Trade Agreement
  - Agreements about specific sectors of the economy

Trade between the UK and EU could be based only on the residual position of World Trade Organisation (WTO) law. Trade between the UK and other (non-EU) countries will be governed by whatever trade agreements the UK (eventually) negotiates. Again, the residual position is WTO law.

### Key Components of Trade Agreements

The essential idea behind a trade agreement is to remove barriers to trade. Removing barriers to trade is [seen as good](#) because in theory it promotes economic efficiency, through 'comparative advantage' (countries specialise in what they are good at producing). These barriers take different forms. EU law calls them: *customs duties* ([Article 30 TFEU](#)); *quantitative restrictions* and *measures having equivalent effect* ([Article 34 TFEU](#)). Customs duties (tariffs or taxes paid when products cross a country's border) increase the cost of cross-border trade. Quantitative restrictions or

quotas limit the number of a type of product that may be imported, usually to protect a sector of the domestic economy (see the [Free Movement of Goods](#) chapter).

The biggest barriers to trade are indirect barriers – the host of rules that apply to products or services sold in a particular country. These rules can be related to the products/services themselves (e.g. a food safety standard) or to the process by which they are produced (e.g. labour law, environmental law, professional standards) or marketed (e.g. a prohibition from advertising prescription-only medicines). Where these rules differ between countries, they impede a company seeking to expand into new markets, for instance by imposing extra costs of compliance with more than one standard. If these rules can be harmonised, trade is no longer so impeded. EU law on these *MEQRs* is one of its most successful aspects.

Trade agreements – broadly speaking – seek to remove or reduce customs duties and quantitative restrictions, and to go some (usually small) way to aligning indirect barriers to trade. They also seek to impose some kind of rule-enforcement process, to ensure that the states parties to the agreement are compliant. The extent to which trade agreements give rights to private individuals to enforce rights to access markets is highly controversial. In EU law, of course, the relevant law is [directly effective](#) and enforceable before national courts, with oversight by the CJEU. Some provisions of the EU's trade agreements are [directly effective](#). Apart from the [EEA](#), no other trade agreement has its own court providing oversight. The WTO's [dispute settlement procedure](#) looks 'court-like', but individuals cannot access it directly. Trade and investment agreements regularly involve [investor-state dispute settlement \(ISDS\) procedures](#), providing that disputes between a company investing in a foreign country and its government be resolved by private (and secret) arbitration.

## EU Law on Trade Agreements

The type of trade agreement(s) that the UK is able to agree with the EU will depend on political considerations. But it will also depend on the [law](#). The EU Member States are bound by obligations in EU law concerning their ability to enter into trade agreements with 'third states' (which the UK will be, once it has left the EU). This is the EU's *Common Commercial Policy* (see the [EU External Relations](#) chapter). The CCP has changed over time, broadly to give the EU greater competence in external trade. It is now found in [Articles 206-207 TFEU](#).

The EU has exclusive competence to enter into trade agreements covering goods, services, intellectual property and many aspects of investment. Agreements that go beyond that (for instance, which include non-direct investment, or ISDS) must be entered into by both the EU and its Member States, and are known as 'mixed agreements'. The latest statement from the CJEU on the EU's competence in external trade law is in [Opinion 2/15](#) on the EU-Singapore Free Trade Agreement. The principles established here will apply to [any trade agreement](#) into which the EU enters with the UK post-Brexit.

Leaving the EU means that the UK will no longer be part of the trade agreements entered into by the EU. Just to maintain the status quo, the UK will need to negotiate and finalise agreements with countries outside the EU separately. The *Financial Times* has [estimated](#) over 750 agreements in this category. The UK cannot do so until it has left the EU, as otherwise it will be in breach of EU law (although it is possible that the EU will permit this as part of a transitional period). The UK will remain a [member of the WTO](#). As a member, it is a signatory of WTO agreements

such as the General Agreement on Trade in Services (GATS), the Agreement on Technical Barriers to Trade, and the Trade-Related Aspects of Intellectual Property Rights (TRIPS). But it will need to renegotiate technical aspects of WTO agreements, such as its GATT schedules on tariffs and other barriers to trade. The WTO has a process for this.

## Possibilities for Future EU-UK Trade Agreements

The TEU and TFEU are an example of the deepest type of trade agreement. Anything less than EU membership by definition means a less effective trade agreement. Trade between the EU and countries such as Norway is governed by the European Economic Area (EEA) Agreement. This requires free movement of the factors of production (including people) between the EU and the other EEA states (Norway, Iceland, Liechtenstein). It creates an 'internal market' between those states.

It does not include the EU's customs union, or common policies in fisheries, agriculture or the regions. But it does make provision for the application of EU internal market legislation on goods, services, persons and capital in the states parties to the agreement. The agreement is based in international (not EU) law, but it does involve monitoring and dispute resolution mechanisms and an independent institutional structure. There is some dispute as to whether it would be a suitable model for future EU-UK trade relations. In particular, the extent to which the UK would become a 'taker' rather than 'maker' of regulations, and the relationship between the EFTA Court and the CJEU are points of discussion. The current UK government appears to have ruled it out.

Countries such as Israel, Algeria, Morocco, Tunisia, and several Eastern European countries have Association Agreements with the EU. As part of the EU's Neighbourhood Policy, trade is linked with geopolitical stability. The EU uses international agreements, which include measures on gradual trade liberalisation, as part of a development package, including aid and technical assistance, aimed to secure economic development and thus security in such countries.

The EU's trade (and other) relationships with Switzerland are based on a (bewildering) array of bilateral agreements. The European External Action Service describes Switzerland as having 'closer ties than with any country outside the EEA'. These ties are secured by multiple bilateral treaties, which fall short of the systemic approach associated with EEA law, and indeed with EU law itself. For instance, the EU's free trade agreements with Switzerland cover many aspects of trade in products, including recognition of product standards, but do not extend to all market sectors (in particular to services). Some aspects of free movement of people between the EU and Switzerland are covered, including through Erasmus+. The EU is said to be dissatisfied with the model on which EU-Switzerland relations are based. Its components take a great deal of time and energy to be negotiated and renegotiated.

The EU's more recent trade agreements, with countries such as Singapore, Ukraine and Canada (yet to enter into force), are known as *Deep and Comprehensive Free Trade Agreements*. These typically go beyond classic free trade areas, and can include cooperation in a broad range of sectors, such as energy, transport or environmental protection. They do not, however, involve the levels of economic integration involved in EU law, EEA law, or even EU-Switzerland relations and the

EU neighbourhood policy. The UK government [seeks](#) a future EU-UK relationship that differs from such agreements; the EU's chief negotiator Michel Barnier [said in October 2017](#) that this is the most likely future relationship, given the current UK government's position.

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## Chapter 17

# EU Private International Law

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### Introduction

Private international law is that area of private law which applies when a foreign element, or issue, is present in the facts of a dispute between parties. The foreign element may concern one or more of the three core questions in private international law – where parties can litigate; what law applies; and where can judgments be recognised and enforced. This introduction focuses on the contribution of the EU to each of these three questions. Reference will be made, by example, to relevant EU instruments and refer to ‘gaps’ where national, residual laws still apply.

### Background

This is a fast changing area of EU law, involving all of the EU institutions in proposing, amending, approving and interpreting of EU Private International Law (PIL). Since the [Treaty of Rome](#) (1957), the EC Member States agreed that national rules which determined on what basis a judgment from a court in one EC state could be recognised and enforced in another EC state were too restrictive. The EC introduced a double convention, the [Brussels Convention 1968](#), which applied in two key respects. First, it introduced reciprocal rules on jurisdiction which determined where a party from one EC state could sue in another EC state. Second, the convention introduced reciprocal rules which determined how a judgment from a court in one EC state could be recognised and enforced in another EC state.

After the UK joined the EEC, the Brussels Convention 1968 came into force via the [Civil Jurisdiction and Judgments Act 1982](#). The EC also agreed another convention, the [Rome Convention 1980](#), which determines what law applies to cross-border disputes concerning contractual obligations. The Rome Convention was introduced into the UK by virtue of the [Contracts \(Applicable Law\) Act 1990](#). The most significant step-change in EU Private International Law was that introduced by the [Treaty of Amsterdam](#) (1997). Article 65 TEC (now [Article 81 TFEU](#)) introduced a Chapter on Judicial Cooperation in Civil Matters. This equipped the EU with competence to take measures in ‘civil matters... based on the principle of mutual recognition of judgments.’ Both the Brussels and Rome Conventions were subsequently converted into EU regulations.

The EU moved forward with its objectives in the field of Justice and Home Affairs through related programmes (such as the [Stockholm Programme](#) 2010-2014) and [strategic guidelines](#) arising from EU summits (such [Tampere](#) in 1999 and [The Hague](#) in 2004). The current programme covers the period 2014-2020. Some EU Member States exercised an opt-out to these programmes and regulations or chose to opt in later. The most prominent example is Denmark, which opted out of the entire Chapter, but subsequently entered into an agreement with the EU to adopt the then [Brussels I Regulation](#) (44/2001). At the same time, the Court of Justice of the European Union (CJEU) also developed a prominent role in advancing this area of law. It has provided important decisions on the extent, scope and meaning of provisions contained in these EU regulations.

Today, EU Private International Law covers a wide range of areas within the competence conferred by Article 81 TFEU. The EU Council has introduced an increasing range of EU regulations in the field of EU PIL. These regulations focus on one or more elements of private international law – jurisdiction, choice of law, and recognition and enforcement of judgments. The EU is also increasingly making use of its Enhanced Cooperation Procedure in topics of mutual interest to particular Member States.

EU regulations apply to: cross-border civil and commercial jurisdiction; matrimonial matters and divorce jurisdiction; applicable law rules for contractual obligations; non-contractual obligations; jurisdiction, applicable law and judgment recognition in insolvency proceedings; jurisdiction for maintenance proceedings; jurisdiction in matters relating to parental responsibility; recognition and enforcement in international child abduction; and applicable laws for cross-border divorce and cross-border succession. A list of the key relevant EU regulations is provided at the end of this chapter. The following sections provide brief overviews of the three fundamental questions of (EU) private international law mentioned at the start.

## **Jurisdiction: Where to Litigate?**

The most contentious issues in a cross-border dispute are where to litigate, or how to avoid litigation in the first place. Both of these issues raise the question of jurisdiction. These issues arise in both cross-border commercial and family matters.

### **Example 1**

Two commercial parties (Company A and Company B) are domiciled in Country A and B respectively. The contract between them is to manufacture goods in Country C and deliver those goods in Country D. Payment of the contract is to be made in a currency of Country E to a branch of the Country E's bank in Country F. The goods are not satisfactory and B does not pay for them. Meanwhile, Company A's agent based in Country G fail to take care of employees and a tort occurs in a Country C causing injury to those employees and third parties.

### **Key Questions**

- Is either party domiciled in an EU Member State?
- What does the parties' contract say? Is there an agreement on jurisdiction?
- If the EU rules apply, which courts can hear the disputes concerned with (a) the contract and non-payment? (b) the actions of the agent? (c) the tort and the third parties' claim?

Each country is a separate legal system for private international law purposes. Parties may be situated in different countries based on their domicile, habitual residence or nationality. The EU rules reflect each of these alternative connections that a party may have with an EU Member State. As far as jurisdiction is concerned, the EU rules apply when one of the parties (usually the defendant) is domiciled in an EU Member State or the parties have agreed to the courts of an EU Member State having jurisdiction.

Where the defendant is not domiciled in an EU Member State, Member States' own laws currently prevail. In commercial disputes, parties should have regard to risks associated with the transaction and which court they can raise proceedings in the

event of a dispute. In this context, the question of jurisdiction is connected to parties' 'litigation and transaction risk'.<sup>23</sup>

Regulation 1215/2012, the Brussels I bis Regulation, determines international jurisdiction in civil and commercial matters. EU Private International Law provides rules of international jurisdiction, which determine on what basis the courts of one Member State are competent to hear a dispute involving a party from another Member State. Regulation 1215/2012 is structured around general, special and exclusive jurisdiction. The regulation specifies those circumstances where jurisdiction is exclusive, including when parties enter into a jurisdiction agreement. As a general jurisdiction rule, the regulation applies the domicile of the defender/defendant. The regulation also provides special jurisdiction rules for a range of cross-disputes concerned with consumer, employment and insurance contracts; contracts including the sale of goods and supply of services; delicts/tort disputes; disputes involving multiple parties; claims for the return of cultural objects; and disputes involving the actions of a branch, agency or other establishment.

In family matters, the question of jurisdiction is connected to a party's ability to raise divorce proceedings, financial support, enforcement of parental rights or the return of a child to his/her habitual residence. The court must ensure that it is appropriate to hear proceedings concerned with the divorce of the parties and matters relating to children.

### **Example 2**

Two parties (X and Y) marry in Country A, move to Country B and after an appreciable period of time establish a habitual residence through work and family connections. Two children to the marriage are born in Country B. After a time, the parties legally separate. Y leaves the matrimonial home to live and work in Country C and commences divorce proceedings there. X moves with the children to Country A, where maintenance proceedings and a custody order relating to both children are sought from Country A's court. With X's consent, Y takes the two children on a holiday to Country D but does not return the children at the agreed date, instead taking both children to Country C. The children start school in Country C and after a time express a view that they do not wish to return to Country A or be separated from each other. X seeks return of the children and maintenance payments from Y.

### **Key Questions**

- Where are the Party X and Y domiciled/habitually resident?
- On what basis does Country A have jurisdiction over a divorce?
- On what basis does Country A have jurisdiction over maintenance proceedings?
- Can X seek the return of the children not returned to Country A and would any defences apply?

Regulation 2201/2003, the Brussels II bis Regulation, determines international jurisdiction relating to matrimonial matters and issues of parental responsibility. The regulation is structured around grounds of jurisdiction for divorce proceedings. It enables a party to raise divorce proceedings in another Member State, depending on the connection one or more of the parties has with an EU Member State. It also provides jurisdiction rules for proceedings concerned with parental responsibility,

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<sup>23</sup> Fentiman, R (2015) *International Commercial Litigation* (Oxford University Press), p 3

such as custody and access, and child abduction (where a child is unlawfully removed to or retained in another country). This regulation does not apply to intra-UK disputes (i.e. to disputes between parties situated in different parts of the United Kingdom).

By contrast, [Regulation 4/2009](#) is a cooperation measure for cross-border maintenance proceedings. It contains rules of jurisdiction, applicable law and recognition and enforcement of judgments concerned with maintenance obligations. Unlike jurisdiction in matters of divorce between different courts of the United Kingdom, the Maintenance Regulation does apply to disputes between parties in different parts of the United Kingdom.<sup>24</sup>

## Choice of Law: Which Law Applies?

The second key issue in private international law is choice of law or the applicable law. The purpose of these rules is to determine which country's substantive laws should apply to a cross-border dispute.

### Example 3

Two commercial parties (A and B), enter into a contract for Party B to deliver goods in Country C and provide services in Countries C and D. A is to pay for the contract goods to a bank in Country E. B does not deliver goods or perform the services. The contract between the parties (a) states that the contract and any dispute is governed by the law of Country B; (b) in the alternative, contains no choice of law agreement. After the contract is concluded, a law is passed in Countries C and D making it illegal to provide the services characteristic of the above contract.

### Key Questions

- What is the effect of the choice of law clause in (a) above?
- How is the applicable law determined under (b) above?
- What is the effect of the law passed in Countries C and D?

As far as civil and commercial matters are concerned, EU applicable law rules are divided into two. [Regulation 593/2008](#), the Rome I Regulation, provides applicable law rules for contractual obligations. The regulation is structured around the general rule of freedom to select the applicable law. Parties may select more than one law to govern their contract, provided that such choice does not provide inconsistent results. The regulation also determines what law applies in the absence of choice. It offers particular choice of law rules for certain categories of contracts, such as contracts of carriage, consumer contracts, individual contracts of employment and insurance contracts. Party choice may be subject to mandatory rules of the applicable law, or of the forum, or of a third state. The applicable law may also be restricted by the public policy of the forum. Once enacted, the regulation applies regardless of whether the result is the law of a Member State or of a third state.

[Regulation 864/2007](#), the Rome II Regulation, provides applicable law rules for non-contractual obligations. It addresses delicts, torts and threatened wrongs. However, it does not apply to disputes alleging defamation. National applicable law rules continue to apply for such claims.

<sup>24</sup> *V, Re*, (also known as *Re V (European Maintenance Regulation)*) [2016] EWHC 668 (Fam); [2017] 1 FLR 1083; [2016] Fam Law 682 (Fam Div)

#### **Example 4**

Party A and B are travelling in a rented car through Country C. Party A is the driver, Party B the passenger. Party A enters a city car park in Country C to search for a parking space. He does not pay attention to the speed limit in the car park or follow the designated route. He crashes the car into Party D's car, which in turn hits the wall of the car park. Party D is from Country C. His car contains two passengers, one from Country C and another from Country E, who sustain neck injuries from the collision. Both cars, and the wall, are seriously damaged.

#### **Key Questions**

- What law applies to the delicts?
- Are there any exceptions that may apply for the law of another country to apply?
- Can the parties agree an applicable law?

The regulation applies the law of the country where the damage occurred. There are exceptions – for example, if the party liable and the party sustaining damage have the same habitual residence, that country's law can apply. Another exception is that, where the delict is manifestly more closely connected to another country, the law of that country will apply. The regulation also provides special choice of law rules for particular categories of delicts such as product liability, unfair competition, environmental damage, IP rights and industrial action. The parties can select the applicable law to their dispute, provided this agreement exists before the event occurred. Once the applicable law is determined, it applies to both the substance and procedure of the dispute. Like the Rome I Regulation, mandatory rules of the forum may displace the applicable law.

### **Judgments: Recognition and Enforcement**

The third component of private international law is the ability of a court to automatically recognise and enforce the judgment of another court. In civil and commercial matters, the Brussels I bis Regulation applies. The regulation seeks to simplify recognition and abolishes the need to satisfy Member States' internal steps for recognition (*exequatur*). Recognition and enforcement will only be refused where the judgment is manifestly contrary to public policy, given in default of the defender/defendant's appearance, or irreconcilable with an earlier judgment.

In matrimonial matters, Article 22 of Brussels II bis Regulation equally provides that a judgment will not be recognised if it is manifestly contrary to public policy, given in default of appearance, or irreconcilable with an earlier judgment. In matters of parental responsibility, the grounds to refuse to recognise or enforce a judgment in Article 23 are broadly similar, but also include a ground where a party with parental responsibility was not given an opportunity to be heard.

### **Future after Brexit**

As explained above, the EU will continue to further approximate laws concerned with civil judicial cooperation. The EU's external remit continues through the [EU 2020 Agenda](#). The objective of this agenda is to 'build an area of freedom, security and justice, without internal frontiers, and with full respect for fundamental rights.' The interaction between this field of EU law and human rights law will become more prevalent. In particular, both EU PIL and national rules, where they prevail, must

ensure respect for parties' rights to a fair hearing and fair trial, along with other analogous rights, such as the right to an effective remedy, respect for private and family life, freedom of expression and the prohibition of discrimination.

The UK has generally opted in to measures in the field of civil judicial cooperation. The UK has enacted (most) EU regulations in PIL. It has done so by amending existing UK legislation. This legislation applies to parties from EU Member States and, in the case of jurisdiction in civil and family matters, applies to parties in different parts of the UK. UK courts have made preliminary reference requests to the CJEU in this field. As part of the Balance of Competences review, the UK government published a study in 2014 of UK-EU [civil judicial cooperation](#).

Brexit will have a significant impact not only on rules of jurisdiction and choice of law for commercial activities, but also for weaker parties such as consumers and employees. It will also impact upon EU-based residents who seek recognition of the status of their personal relationships (civil partnership, marriage, same sex marriage, separation and divorce) and for children subject to disputes concerning matters of parental responsibility (adoption, access/contact/custody and international child abduction). In parallel with the Brexit negotiations, the UK government and devolved administrations will have to review and revise existing private international law rules applicable between different parts of the UK (England/NI and Scotland) to ensure coherence and consistency prevail for the benefit of parties resident in different parts of the UK.

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## **Key EU Regulations in the field of EU Private International Law**

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[EC 805/2004](#) – European Enforcement Order for Uncontested Claims

[EC 1896/2006](#) – European Payment Procedure

[EC 861/2007](#) – European Small Claims Procedure

[EC 864/2007](#) – Rome II Regulation (Non-Contractual Obligations)

[EC 1393/2007](#) – Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters

[EC 593/2008](#) – Rome I Regulation (Contractual Obligations)

[EC 4/2009](#) – Jurisdiction, Applicable Law, Recognition and Enforcement in Matters Relating to Maintenance Obligations

[EU 1259/2010](#) – Enhanced Cooperation for Law Applicable to Divorce and Legal Separation

[EU 650/2012](#) – Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions in Matters Relating to Succession

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[EU 2015/848](#) – Insolvency Proceedings (Recast)

## Chapter 18

# The Position of EU Law on the Route to Qualification as a Solicitor Post-Brexit

Rob Marrs *Law Society of Scotland*

The law of the European Union forms a mandatory part of the route to qualification as a Scottish solicitor, which is regulated by the Law Society of Scotland. This will continue to be the case as long as the United Kingdom remains a Member State of the European Union. After all, it is important that those intending to become solicitors understand the legal system in which they will be working.

The academic element of the route to qualification as a solicitor in Scotland, the Foundation Programme (Scottish Exempting Degree) – more commonly known as the LLB – comprises *outcomes*. These outcomes are divided into three areas: (1) knowledge areas covering knowledge and sources of law; (2) skills including subject-specific, general transferable, intellectual and key person skills; and (3) values and attitudes. The Society's [Accreditation Guidelines](#) detail these outcomes in detail.<sup>25</sup>

By the end of the Foundation Programme, a student should display a fundamental knowledge and understanding of the purpose and sources of law, and the main elements of public and private law in Scotland in the UK, EU and wider international law setting through the study of: the profession of law, legal systems and institutions affecting Scotland; human rights, freedoms and protections; persons; property; obligations; and commerce and crime. A knowledge and understanding of EU law is a fundamental part of the current Foundation Programme. Moreover, the outcome relating to legal systems and institutions affecting Scotland includes considerable specific content on EU law, such as:

- Constitutional structure and competence of the EU and allocation of competencies between EU and Member States
- Sources of EU law, EU institutions and the legislative process
- relationship of EU law and national law including domestic and EU remedies
- Principles of the EU single market

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<sup>25</sup> The [Accreditation Guidelines for PEAT 1](#) (the vocational stage of the route to qualification) note, when commenting on the Core and Mandatory Outcomes: *'In addition, as regards EU and Human Rights legislation and their effects on legal practice, it is assumed that students will understand the implications of such legislation as regards area of practice studied in PEAT 1; and that such implications will form part of the resources to be made available to students. These include such matters as relevance of Convention rights, relevant EU and Human Rights case law, whether parties may bring proceedings and under which conditions, and the range of remedies a party may invoke.'* The areas of practice outlined in the PEAT guidelines are: business, financial, practice awareness; private client; conveyancing; litigation (civil and criminal); and tax. As PEAT 1 builds on the Foundation Programme, a certain level of knowledge of EU law is assumed.



The areas above are those where EU law is specifically named. There will be other areas of content which contain EU elements (e.g. principles and sources of constitutional law) and EU law appears in other outcomes (e.g. the principles of the EU single market appears in commerce, while human rights, freedoms and protections – which will have some EU content – is pervasive throughout all outcomes).

When the UK leaves the EU, the position of EU law as mandatory content for intending solicitors will come under some scrutiny. Should EU law continue to be mandatory? Should it – can it? – be taught in a different way? Ought it to become an elective subject which is offered to students by universities, but is not required by the Society via its accreditation processes? If there were to be change, when should such change occur?

## What Happens Next?

The [European Union \(Withdrawal\) Bill](#) currently provides for:

- Repeal of the [European Communities Act 1972](#). This Act provides legal authority for EU law to have effect as national law in the UK. This will no longer be the case when the Bill becomes law.
- Transposition of all EU laws onto the UK statute books. This means that laws and regulations made during the time of the UK's membership of the EU will continue to apply.
- Power to make wide-ranging secondary legislation, including that which will amend Acts of Parliament. Technical problems will arise as EU laws are put on the statute book. For instance, many EU laws mention EU institutions in which the UK will no longer participate after Brexit, or mention 'EU law' itself, which will not be part of the UK legal system after Brexit. It is possible there will not be time for parliament to scrutinise every change, so the bill will give ministers some powers to make these changes by secondary legislation.

It is understood these changes will come into effect on the day the UK leaves the EU. This, at present, will be in late March 2019, unless there is some form of transitional arrangement agreed. At that point, much of what is currently considered EU law will become the law of the UK (and subject to change by future UK governments rather than the EU institutions). The institutions of the EU, their directives, legislation and precedents will no longer affect the UK directly.

The nature of the post-Brexit relationship between the EU and the UK will also be of significant importance to future Scottish solicitors, but at this stage it is impossible to know what that relationship will entail. It is also entirely possible that there will be a divergence between EU law and the law of the UK in certain areas post-Brexit. If the legal systems diverge, the requirement to maintain EU law as mandatory and as currently taught may become less tenable.

## What Do We Mean by 'EU Law' in Terms of the Route to Qualification?

As above, in terms of the current route to qualification, *EU law* essentially means two things. The first consists of the matters outlined above which are part of the outcomes of the Foundation Programme. These matters are normally taught in courses titled '*European Union Law*'. This will be where EU law outcomes will usually

be assessed. The second expands on the relationship of European Union law and national law. Many modules include descriptors along the lines of *'to consider the development of Scottish/British (insert area of law) law within its European context'*.

This is because EU law is pervasive and there is likely some EU element in most areas of legal knowledge (e.g. constitutional, family, employment and competition). As Lord Denning noted *'it (EU law) flows into estuaries and up the rivers. It cannot be held back'*.<sup>26</sup> Indeed, later in his life, Denning described EU law as a *'tidal wave bringing down our sea walls and flowing inland over our fields and houses – to the dismay of all'*.<sup>27</sup> Regardless of where one bobs up and down on Denning's watery spectrum, it seems as though, through the EU (Withdrawal) Bill, the UK government intends to erect levees and dykes in the near future.

Having triggered Article 50, the UK will leave the EU. It is perhaps useful to state what that will definitely mean: the EU treaties will not apply to the UK. It will not elect MEPs nor will it be represented on the European Council or the European Commission. The European Union's post-Brexit directives and regulations will not cover the UK (unless the UK either chooses to adopt them voluntarily or must do so as part of a trade agreement). The Court of Justice of the European Union will no longer have jurisdiction over the United Kingdom. The United Kingdom will no longer provide judges to the Court of Justice or the General Court or provide any Advocates General. The nature of access to the Single Market will change. In the short term, there may be no need to change the Scottish legal curriculum substantively, given the intended nature of the EU (Withdrawal) Bill. In the medium to long term, will there have to be?

## How Much Will EU Law Still Matter?

Whatever occurs post-March 2019, the law of the EU will continue to be of significant importance to our legal system. The EU (Withdrawal) Bill will, after all, incorporate an enormous body of EU law into UK law. The history, knowledge and sources of this law will remain distinctly European. There are some areas of law where a European influence is likely to continue into the future (e.g. procurement, competition and data protection). Some concepts within areas such as competition law would not exist but for the European Union. Existing CJEU case law will form precedent in UK courts. More than this, the EU (Withdrawal) Bill provides that, while UK courts will not be bound by decisions of the Court of Justice, they may have regard to them if it is appropriate to do so. There will also be 'run off' issues for a number of years post-Brexit.

If principles, concepts and sources of law which were previously considered as EU law become part of UK law – as is proposed – law students will likely need to have a knowledge and understanding of how and why that came to be. Whatever happens, it seems that some level of knowledge of EU law will be necessary to understand our own legal system. At a recent Scottish Universities Legal Network on Europe meeting, three of Scotland's largest law firms made a case that they would expect future trainee solicitors to have significant EU knowledge.<sup>28</sup>

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<sup>26</sup> *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401 at 418

<sup>27</sup> Smith, G (1990) *The European Court of Justice: Judges or Policy Makers?* (Bruges Group), Intro

<sup>28</sup> Brodies LLP; Maclay, Murray & Spens LLP; and Shepherd & Wedderburn LLP

Future Scottish solicitors will need to understand the nature of any trading relationship between the UK and EU, any transitional arrangements between the UK and the EU, and also trade agreements between the UK and the rest of the world (and how they interrelate with any agreement with the EU). This will, after all, be UK law. It is generally very difficult to unwrite history. In the same way that it would be difficult to remove the influence of Roman law or English law from the Scottish legal system, it will be difficult to remove the influence and importance of European Union law from the Scottish legal system.

### **What Comes Next?**

Even taking on board the above points, it is hard to argue that the matters usually covered in a discrete EU law module would need to be mandatory for all intending solicitors post-Brexit. Why would – for instance – all future Scottish lawyers need to know the institutions of the EU and its legislative process, or the allocation of competencies between the EU and Member States? Whilst this may be useful, it seems (over the longer term) to be unfeasible that such knowledge should be mandatory for all future solicitors. As well as this, the UK government has signalled its intention to agree trade deals with countries globally, as well as negotiating a trade deal with the European Union.

This trade focus means that Scottish solicitors will benefit from knowledge and understanding of the EU single market and the laws around that market. Depending on the UK's post-Brexit status, knowledge of EFTA and its arrangement may also be beneficial. Given the intended global focus of a post-Brexit future, a deeper understanding of International Private Law, Public International Law, international arbitration, and international trade law will likely be necessary for Scottish solicitors. None of these are currently mandatory on the route to qualification as a solicitor, although some universities will teach, for instance, International Private Law and Public International Law (and intending advocates must study International Private Law). It ought to be noted that the current undergraduate curriculum is crowded. It is unlikely, without significant overhaul, that all the above areas, plus EU law as currently constituted, could be incorporated.

### **What Are the Likely Future Options?**

There are a number of options before the Society. The first is status quo: mandating that EU law be taught as part of the route to qualification, regardless of the nature of Brexit and any subsequent trade deals. Some may say that the world's largest trading bloc being so close to Scotland means that it would be prudent for the Society to continue to mandate EU law. Yet few would argue that Scottish law students need to understand English litigation practice and procedure, English probate, or English property law – despite Scotland sharing a constitution with England and Wales, the fact that the English legal market is one of the biggest in the world, and the nature of intra-UK business arrangements.

The second option is that the Society rewrite its accreditation guidelines and remove mandatory references to the law of the European Union. This would likely fall into three choices. The first choice, in essence, would see EU law become a modern-day Roman law. Studying the Roman laws of contract, delict or property can be useful for studying the complexities of Scots law. However, many law students successfully navigate the choppy waters of Scottish legal study without formal study of Roman law.

The second choice would see EU law forming part of a wider 'international law' module and focus. At present, EU law is often taught as a discrete module. This would be comparatively easy to replace (e.g. EU law would leave the syllabus and be replaced with something else). The matter of EU law being taught pervasively means replacement becomes trickier. It is likely that its pervasive nature to an extent would mean an ongoing EU presence (e.g. the history and context of the newly incorporated British law would still require EU knowledge). It is likely that, even if the Society were minded to remove the formal requirement, some EU law would need to be taught anyway. The third choice would subsume – in some way – EU law into a bigger 'international law' module, incorporating, for instance, International Private Law and Public International Law, as well as EU law. How such a course is constructed and taught is another question entirely.

It is likely that the Society will need to consult with the profession and academia about which areas of law (if any) should replace EU law. The bigger questions, though, would be: What are the principles that would guide any such consultation? And what do we want the qualification – and the badge of solicitor – to be?

## Chapter 19

# The Future Place of EU Law in Admission to the Faculty of Advocates

Kirsty Hood QC *Faculty of Advocates*

### Current Position

The [Faculty of Advocates](#) is the regulatory body for the Advocate branch of the Scottish legal profession. The requirements which have to be fulfilled in order to become an advocate are set out in the Faculty's admission regulations, the [Regulations as to Intrans](#). The core requirements<sup>29</sup> are: (1) an LLB degree; (2) passes in examinations in certain specified areas of Scots law,<sup>30</sup> and in an examination in Evidence Practice & Procedure;<sup>31</sup> (3) the Diploma in Legal Practice; (4) a traineeship in a solicitor's office; and (5) a period of pupillage (more commonly known as 'devilling') at the Faculty of Advocates itself (this comprising advocacy skills coursework, shadowing and assessment).

With regard to the first aspect of requirement (2), the precise requirement is that applicants must pass a Faculty examination in each of the specified areas of Scots law, but may be exempted from these on the grounds of prior study. Indeed, subject-for-subject exemption will be automatic where an applicant has passed the equivalent degree exams during his/her LLB within the seven years immediately preceding an application for exemption. Effectively then, those wishing to be admitted to the Faculty of Advocates must study these listed topics during their LLB degree (or pass an equivalent examination)<sup>32</sup> or pass the Faculty examinations in each of those topics. One of these topics is *European Law and Institutions*. Inevitably, of course, EU law will form an important part of other of the listed topics (such as *Constitutional and Administrative Law* and *International Private Law*).

### Historical Context

The importance attached by the Faculty of Advocates to the study of EU law actually pre-dates the UK's accession to the European Economic Community (as it then was)

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<sup>29</sup> Exemptions may be sought by applicants in the light of their own individual circumstances. There are also special pathways for legal practitioners from other EU Member States, and members of the Bars of England & Wales and Northern Ireland

<sup>30</sup> The subjects are listed in Appendix A(1) of the *Regulations as to Intrans*. They currently are: Roman Law of Property and Obligations; Jurisprudence; Constitutional and Administrative Law; Scottish Criminal Law; Scottish Private Law; Commercial Law and Business Institutions; Evidence; International Private Law; and European Law and Institutions

<sup>31</sup> See Appendix A(3) of the *Regulations as to Intrans*

<sup>32</sup> Thus, for example, an exemption may be granted where an applicant has passed the Law Society of Scotland professional examination in a subject, or has passed an examination in a subject as part of a Law degree taken outwith Scotland (and where no special knowledge of Scots law would be required)

in 1973. In the 1960s, the Faculty was revising the *Regulations as to Intrans* to take account of the full-time LLB beginning to be offered by Scottish universities<sup>33</sup> – and it was in 1968 that a European law topic first appeared in those Regulations. At that time, *European Institutions* became one of a number of optional subjects, of which aspiring candidates for the Bar required to be examined in two.

As early as 1970, the Faculty attained observer status at the Consultative Council of the Bars and Law Societies of the European Community Countries (CCBE), becoming a full member on the UK's accession.<sup>34</sup> In the 1982, and 1987, versions of the *Regulations as to Intrans*, *European Community Law and Institutions* remained on the list of optional subjects. However, in 1989, *European Community Law* became a mandatory subject of study for entry to the Faculty. As indicated at the outset, this remains the case now – thus EU law is one of a number of core subjects which the Faculty requires applicants to have studied.

## Future Position

Following upon the result of the referendum on EU membership in June 2016, the UK government signalled an intention for the UK to withdraw from the EU – and then triggered the Article 50 procedure in March 2017. Inevitably, the question will be posed as to whether the regulatory bodies of the Scottish legal profession will continue to require that those entering the profession demonstrate a minimum level of expertise in EU law?

For the short term, the clear answer from the Faculty's point of view is 'yes'. The UK remains an EU Member State at present, and it is therefore just as essential that those coming to the Bar continue to have the appropriate level of expertise in EU law, such that clients can be properly and accurately advised. In any event, there would still seem to be uncertainty as to exactly what the future holds for the UK, and for Scotland in particular, with regard to the relationship with the EU.<sup>35</sup> It would therefore be premature to take a decision that EU law need not be studied by aspiring advocates, before the position becomes clear. Finally, were the UK to exit the EU and seek to cut all ties with that body (or forge a dramatically different relationship to that which exists at present), it would seem likely that there would be legacy cases,<sup>36</sup> and there may well be transitional provisions. For clients to be properly advised and represented, a thorough knowledge of EU law therefore remains indispensable in the short term.

In the medium to longer term also, there are certain considerations which would currently seem to support the continued study of EU law by those wishing to come to the Scots Bar. Firstly, the current position of the UK government is that EU law will essentially be transposed into the law of the various jurisdictions of the UK at the exit

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<sup>33</sup> Stair Memorial Encyclopaedia, *Legal Profession* Reissue, Para 92

<sup>34</sup> Stair Memorial Encyclopaedia, *Legal Profession* Reissue, Para 90

<sup>35</sup> The EU-UK negotiations are still underway and thus have not been concluded. Furthermore, in the wake of the EU referendum, there has been debate as to whether there should be a further referendum on Scottish independence at some point

<sup>36</sup> See, for example the European Commission's [Position Paper on Ongoing Union Judicial and Administrative Procedures](#) (TF50 (2017) 5); the UK government's [Ongoing Union Judicial and Administrative Proceedings Position Paper](#); the European Commission's [Position Paper on Judicial Cooperation in Civil and Commercial matters](#) (TF50 (2017) 9/2); and the UK government's [Providing a Cross-border Civil Judicial Cooperation Framework: A Future Partnership Paper](#)

date (and that, thereafter, the UK could decide which of these rules and regulations are to be retained). Thus the [European Union \(Withdrawal\) Bill](#) currently provides that direct EU legislation will form part of the law of the UK jurisdictions, and EU-derived domestic legislation will continue to have effect, despite the planned repeal of the [European Communities Act 1972](#) on the exit date. Specific provision is also made in the bill with regard to how CJEU case law may be used in interpreting this 'retained EU law'.

All of this would suggest that 'retained EU law' will form a significant part of Scots law for some considerable time to come – and not merely on an interim basis, as the intention of the UK government would seem to be that some of the 'retained EU law' will be permanently retained (and simply have a different legislative source than at present).<sup>37</sup> Practising as an advocate can involve the need to consider, and advise upon, novel and complex legal problems. It is important that advocates have sufficient depth to their knowledge of the Scots legal system and Scots law, to be able to undertake reasoning from first principles as necessary, in such novel and cutting-edge cases.

Thus the Faculty continues to demand that applicants study *Roman Law of Property and Obligations*, because of the formative influence of Roman law in the Scottish system. The compulsory study of *Jurisprudence* for entry to the Faculty ensures that applicants have an understanding of the philosophical roots of the law, and of the dilemmas which may arise. It can easily be seen that similar arguments might be made for a continued requirement to have studied EU law in order to be admitted to the Faculty, if EU law is to continue to shape, and essentially form a significant part of, Scots law. Secondly, even if the UK withdraws completely from the EU, it might yet still align itself with EU law in certain areas. If so, the study of EU law in those areas would continue to be important for those wishing to practise at the Scots Bar.

It is necessary, however, to maintain an open mind as to what the Faculty should most appropriately seek from applicants in the future, in order to be satisfied that they demonstrate sufficient knowledge of EU law. Obviously, the context in which the Scottish universities teach EU law in the future may alter – for example, other international instruments or organisations may assume an importance such that EU law is taught as part of a wider course on international trade law. If so, the Faculty would require to consider whether study of *that* topic, rather than a narrower focus on EU law alone, should be mandated for entry to the Bar.

It should be remembered that one of the other areas of Scots law which the Faculty already demands that applicants have studied is *International Private Law*.

Similarly, if Scottish universities were to move to disperse the teaching of EU law, and EU-derived law, throughout other subject areas (such as constitutional law, family law and so on), clearly the Faculty would require to consider whether to take a similar approach with regard to the Faculty examinations.

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<sup>37</sup> To take merely one example, it would currently seem to be proposed that the Rome I and Rome II instruments (which determine applicable law in respect of contractual and non-contractual obligations) will be incorporated and retained in the law of the various UK jurisdictions (see the UK government's [Providing a Cross-border Civil Judicial Cooperation Framework: A Future Partnership Paper](#))

## Conclusion

The current position may be stated with certainty: knowledge and understanding of EU law remains a key requirement for those wishing to be admitted to the Faculty of Advocates, and no change is anticipated in the short term. However, at this stage, it is difficult to be so definite about the medium- to long-term future. Plainly it will be necessary for the Faculty to review the position once the shape of the future relationship between Scots law and EU law is clear.

Whatever happens, it does seem likely that retained EU law will remain a sufficiently significant part of Scots law, so that the Faculty will wish to ensure (through its admission rules) that all applicants demonstrate the appropriate level of expertise therein. How that expertise is most appropriately demonstrated (whether by gaining a pass in a stand-alone compulsory EU law topic or in a wider compulsory topic, or by EU law being infused through the other compulsory topics) cannot yet be predicted. In this regard, the Faculty will continue to liaise closely with Scottish universities and the Law Society of Scotland going forward.



# Studying EU Law in Scotland during and after Brexit

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October 2017