

No Deal Brexit, Business and the Rule of Law



Nyasha Weinberg



British Institute of
International and
Comparative Law

About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society - too important to remain the exclusive preserve of courts and lawyers.

Our main activities are as follows:

- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally.
- We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

Table of contents

Abstract.....	3
Acknowledgements.....	3
Executive Summary.....	4
Introduction.....	6
Chapter 1: The legal implications of a No Deal Brexit.....	10
Chapter 2: Rule of Law impacts for business from a No Deal Brexit.....	13
Chapter 3: Specific sectoral impacts for business from a No Deal Brexit.....	23
Chapter 4: Analysis of the Rule of Law implications	33
Bibliography.....	38

Abstract

The profound changes that would accompany a No Deal Brexit will transform the legal environment in which business operates, from changing the terms of trade relationships in Europe, to the structure of regulation and the content of laws. This paper explores the consequences for the Rule of Law for Business from these changes, by drawing on the perspectives of experts from the Bingham Centre's business network and other Brexit experts. Our interviews revealed that the search for certainty over the laws on Exit Day has assisted business to make extensive preparations for a No Deal exit. However, it has not provided sufficient information over the future relationship to enable long-term planning. Moreover, the vast swathes of law passed under delegated legislation, and prospect for the UK to track EU rules without democratic input threatens to jeopardise Rule of Law principles certainty, clarity and legitimacy.

The Report represents the views of the author on the basis of the research conducted, and is not to be taken to represent the views of any businesses or experts who took part in the survey or interviews.

Acknowledgements

We would like to thank the Business Network members for sharing their perspectives with us during interviews. We would also like to thank subject-matter experts that spoke with us including (among others) Colin Paterson, Peter Sheridan, Barrie Deas, Isabella Mosselmans and Oliver Patel. We would additionally like to thank all those who reviewed the draft report and provided their invaluable comments and perspectives, in particular Daniella Lock, Lise Smit, Oliver Garner, Jack Simson Caird and Murray Hunt.

Executive Summary

As we near the end of another important chapter of the unfolding Brexit saga, it is essential to maintain focus on what lies beyond for the Rule of Law amid so much uncertainty. According to outgoing European Commission President Jean-Claude Juncker the “No Deal risk is palpable” with unresolved issues such as the Irish Border preventing the parties finding consensus. For UK Prime Minister Boris Johnson, fulfilling his commitment to a ‘do or die’ exit before the 31 October means bypassing the so-called “Surrender Act” intended by Parliament to block No Deal. Although Brexit without a deal isn’t the final death knell for a future agreement between the UK and EU, it will mean exit from the EU and its institutions without a withdrawal agreement, transition period or clarity over the future relationship with the uncertainty that each of those brings.

Anticipating the major legal changes that come with such an exit and prospect of a sudden end to a half-century long legal, economic and political relationship, this paper assesses the Rule of Law impacts of No Deal for business. Our objectives are to help policymakers and the public understand how Rule of Law issues play out for businesses, and to help business chart a path that minimises the risk that accompanies Rule of Law threats. This is based on research that show the Rule of Law is a fundamental component of a healthy business environment; with principles such as legal certainty and clarity affecting the costs and risks of doing business. To achieve this, we conducted interviews with legal experts from a range of businesses across the UK, and some subject-matter experts to cover some sectoral issues in greater detail.

For many businesses a No Deal exit from the EU risks jeopardising Rule of Law principles of legal certainty, clarity and democratic scrutiny of the law-making process. Many businesses have already taken precautionary measures, but these are insufficient to mitigate all risk. There remains an irreducible amount of Rule of Law risk for business in a No Deal Brexit.

During our interviews, businesses drew out a number of significant risks to fundamental Rule of Law principles, including the following:

- That obtaining **certainty** on the future legal framework was the top priority, but this had not been secured. To some extent the European Union (Withdrawal) Act 2018 (“EU(W) Act 2018”) and subsidiary legislation has provided stability by assuring business that activities would continue to be governed by European frameworks as incorporated into UK law. Yet, as the contours of the future partnership with the EU under a No Deal outcome remain **uncertain**, trade-dependent businesses were apprehensive about the emergence and extent of non-tariff barriers. Nor were businesses sure about whether policy proposals that would mitigate the impact of No Deal in significant areas such as citizens’ rights, and financial services would come to fruition in a No Deal scenario given current levels of political instability.
- For business, effective functioning requires that activities are governed by easily understandable and clear legal norms, that is, **legal clarity**. Business had a reasonable overall sense of what the applicable law would be following a No Deal exit but had limited clarity about its practical operation as suddenly leaving an existing legal order after such a long period of regulatory enmeshment is clearly without precedent. Areas where business were particularly **unclear** include: the consequences for UK law as EU law changes for sectors where the UK has proposed to minimise regulatory divergence to facilitate market access; the role of the ECJ; the impact of delegated legislation drafted in haste in preparation for a No Deal; and the emergence of multiple areas of new law that do not map on to previous legal categories.
- On exit from the EU the UK will lose its ability to participate in the regulatory process. Business therefore raised concern about losing the **ability for democratic input into EU law-making**. Many emphasised that being to EU rules without participation in the rulemaking process would not deliver for UK interests.

- Business also noted that a unique set of issues are emerging in Northern Ireland that blend each of these risks.

Perhaps unsurprisingly, **business demonstrated its resilience in the face of the above Rule of Law risks**. All those we spoke to had conducted contingency planning, and many had already evolved their strategy by transferring operations overseas or changing suppliers. Nevertheless, many identified that some of the legal issues faced were insurmountable by careful business planning: for example, there was no way to circumvent the damage sustained to the UK's reputation for its secure legal environment, or new complexities around the enforcement of judgments.

More than three years after the referendum vote for Brexit our respondents were concerned about whether all policy and legal frameworks that will affect their operations under a No Deal Brexit satisfy basic Rule of Law requirements of certainty, predictability and foreseeability.

Many of our interviewees noted that prolonged legal uncertainty and a lack of legal clarity beleaguered their operations; citing specific sectoral issues as examples. As we explored this over the course of our interviews, we were able to identify some areas in which acute Rule of Law risk remains; including:

- Areas of Brexit where the policy intention has been set, but no primary legislation has been passed; such as citizens' rights.
- Areas of No Deal related Brexit legislation abandoned by the Government which look unlikely to be resumed, leaving a legal lacuna, such as in the areas of agriculture and fisheries.
- Areas dependent on trade like financial services and chemicals where the UK seeks to mirror EU legislation in search of market access, but some are calling for divergence.
- Areas where EU decisions will determine the UK's legal regime, such as around data where the UK is hoping for an equivalency decision to avoid significant disruption.

Other sectors, including aviation, face specific legal issues however this report does not cover these.

A No Deal Brexit raises significant tensions between different components of the Rule of Law. The need for legal certainty on Exit Day, for example, conflicts with the need for legislative scrutiny. There is a significant risk that these may present long lasting issues for the Rule of Law with serious consequences for business.

Building on the findings from business we analysed the Rule of Law risk in more detail, drawing from the extensive research literature in this area. We found that in the search for certainty over the laws on Exit Day the UK's government's approach to untangling the relationship with the EU leads to significant Rule of Law risk. Specifically, as a significant tranche of legislation has been passed as secondary legislation, this offered less opportunity for input by business through consultation, is less transparent, and gives less time for business to prepare.

From the perspective of business a No Deal exit on the 31st of October would give rise to irreducible uncertainty which is both bad for business and bad for the Rule of Law.

Should a No Deal exit take place on the 31st of October business would have some assurance about the laws that would apply: the EU(W) Act 2018 has led to the transposition of most EU law onto the UK's statute book, and the profusion of policy papers provide some evidence of the Government's intent. It is true that the Government has gone some way to mitigating the risks by offering a degree of legal continuity and recognising the agility of business in responding to the shifting sands. However, it is clear that the unfinished Brexit bills, unscrutinised statutory instruments and lack of clear direction about the future relationship between the UK and the EU leaves an irreducible amount of legal uncertainty which is both bad for business and bad for the Rule of Law.

Therefore, unless the UK agrees an extension and finds an arrangement with the EU that offers businesses more clarity about the future environment, the issues raised above are likely to undermine business confidence by damaging the fragile foundations of certainty and confidence on the basis of which business operates.

Introduction: What are the Rule of Law Implications of a No Deal Brexit for business

Background

This paper explores the Rule of Law implications from a No Deal Brexit for business. While an extensive literature exists on the economic implications for business, and excellent studies look at the legal implications, this paper aims to contribute to the wider body of knowledge on Brexit by setting out the specific impacts on principles core to the Rule of Law for this critical stakeholder group.

The primary focus is on the impacts from No Deal, which remains a possible outcome of the Brexit 'endgame'. However, the authors of the paper note that the findings, many of which refer to the operation of Brexit-related legislation, would also be relevant to other, softer forms of Brexit. Therefore, this paper aims to offer insights of relevance beyond assisting No Deal preparations to policymakers, lawmakers and business.

On Thursday 11th April 2019 the UK and the European Council agreed to extend the period of time for withdrawal from the EU under Article 50(3) of the Treaty on the European Union until 31st October 2019. The Brexit extension period from April to October has been a politically turbulent time: including a Conservative leadership election, the expulsion of 21 MPs from the Conservative Party, the prorogation of Parliament and subsequent Supreme Court judgment that the prorogation is "void and has no effect". We have seen multiple defeats for the Prime Minister Boris Johnson with Parliament voting for legislation to effect a further Brexit delay to prevent a No Deal exit; and then blocking the Prime Minister's attempt to call an election. The Government, as of late October has failed to win eight votes of the eight that have been put forward since the start of Boris Johnson's premiership.

As of the date publication of this report Johnson is still trying to find a workaround to the No Deal legislation so that he can stick to his "do or die" deadline of the 31st October. The government is now seeking a prorogation to bring the current parliamentary session to an end on Tuesday 8th October ahead of a planned Queen's Speech on 14 October. An election now cannot take place until November, following MPs twice moving block the Prime Ministers' attempts to call an early election.

The legislation by Parliament to block a No Deal has not taken this option entirely off the table. The European Union (Withdrawal) (No. 2) Act 2019, or the 'Benn Act', sets out that unless a deal is reached with the EU or Parliament approves a No Deal Brexit by October 19th, that Government must write to the EU seeking an extension to the Article 50 period until January 31st 2020.¹ But this leaves multiple routes to No Deal, among others these include that Parliament could vote in favour of a No Deal exit by the 19th October, the EU could reject a further extension and the UK could fail to agree a deal, an election could change the arithmetic in the commons, or there could be a second referendum with No Deal as one of the possible outcomes on the ballot paper. In each of these scenarios; No Deal could transform into a practical reality, as early as the 31st October. Although UK business and the legal profession should stand ready for such an eventuality these timeframes are extremely short, and so do not reflect anything close to the optimal operating environment for business, a point explored in more detail below.

Objectives

Understanding the legal impacts for business is a fundamental part of fully mapping the consequences of No Deal. Much has been written about the legal and economic impacts from Brexit, ranging from

¹ European Union (Withdrawal) (No. 2) Act 2019

government estimates of the economic cost,² think-tanks' assessments of the impacts,³ trade associations and Parliamentary reports. However, aside from a few very helpful short articles there has been no overarching investigation into the Rule of Law impacts for business.⁴

This paper therefore proposes to add to excellent work done to date teasing out the economic consequences, by evaluating the consequences for the Rule of Law. Given the conflicting messages about the potential for harm, this report looks carefully to assess the magnitude of Rule of Law impacts, and asks questions about areas where the Rule of Law could be improved: for example by addressing the 'democratic deficit' associated with EU membership and remote decision-making. The paper concludes with an in-depth exploration of the Rule of Law impacts, to provoke discussion about whether these have been properly considered and prepared for.

Methodology

We focused our research for this paper on personal interviews with members of the Bingham Centre's Business Network, supplemented by interviews with subject matter experts, trade associations and business groups. The aim of the interviews was to get the views of those who will be most affected by the legal changes from Brexit and have closely considered their impacts. This research was supported by a review of the ever-growing body of literature on the legal and economic impacts of Brexit.

We are enormously grateful to those who allowed us to interview them. Their thoughts and contributions form the backbone of the insights in this paper. Due to the sensitive commercial nature of many of the comments, we are not attributing quotes to these individuals, and have removed details that would allow for easy identification.

The Rule of Law and Business

Research demonstrates that the Rule of Law is essential for business success. The cost of doing business, and wider business risk are impacted by Rule of Law issues such as certainty, legality and transparency. This section sets out the relevant Rule of Law issues from a No Deal Brexit.

Principles underpinning the Rule of Law for businesses

Before identifying the impacts of a No Deal Brexit on the Rule of Law, this paper seeks to offer a workable definition of the Rule of Law for business. For business, operating in an environment subject to the Rule of Law means operating within a system that adheres to a number of principles, which we flesh out in detail below.

Tom Bingham describes eight principles fundamental to the Rule of Law, (i) accessibility, (ii) law not discretion, (iii) equality, (iv) exercise of power, (v) human rights, (vi) dispute resolution, (vii) fair trial, and (viii) compliance with international law⁵. This 'thick' conception of the Rule of Law extends out from Raz's 'thin' expression of the general principles of the Rule of Law, which require that laws should be:

"prospective, open and clear; laws should be stable; the making of laws should be guided, open, clear, and general rules; the independence of the judiciary must be guaranteed; natural justice must be observed; courts must have reviewing power over some principles; courts should be accessible; and the discretion of crime-preventing agencies should not be allowed to pervert the law."⁶

² EU Exit, [Long-term economic analysis](#), November 2018

³ IfG, [Preparing Brexit: No Deal](#), July 2019

⁴ Barnard, [Where does Brexit leave UK law?](#), March 2019

⁵ Bingham, *The Rule of Law*, July 2011

⁶ Raz, *The Rule of Law and its Virtue*, 1979

Of the principles listed above we consider that those most relevant to business are: predictability, clarity, stability, accountability and accessibility. It is generally thought that the UK, with one of the most well established Parliamentary, legal and institutional cultures in the world, had, until Brexit, often been seen as a 'textbook' example of a state that complies with the Rule of Law. Furthermore, the Rule of Law is considered to be a fundamental component of the UK's constitution, following Locke's principle that "the natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule".⁷

How does the Rule of Law relate to Brexit?

Regardless of the virtues of the UK's legal system to date, the process of unpicking the UK's laws from those of Europe following 45 years of integration raises a serious challenge for the Rule of Law. The process of revisiting uncodified constitutional arrangements has exposed the centrality of the EU legal order to many aspects of business operations, and exposed dormant tensions. It is for these reasons that Brexit has created the type of tangle that necessitates clear analysis of the Rule of Law consequences.

Of all of the possible Brexit outcomes, it is a No Deal Brexit that marks the most significant rupture with the previous legal regime, and gives rise to the most near-term Rule of Law threats.⁸ Ultimately, therefore, we find ourselves in a situation where the UK's strong foundation in the Rule of Law is under threat. This is insofar as the process of leaving without a deal creates challenges for Rule of Law principles that are likely to have serious consequences for the integrity of our legal system if left unaddressed.

Why focus on business?

Business is one group of UK stakeholders that are most concerned about the legal impacts of a No Deal Brexit. A majority of businesses surveyed have expressed significant concerns that a No Deal Brexit would inflict serious damage on the economy.⁹ Organisations representing business interests such as the Institute of Directors¹⁰ and the CBI¹¹ have repeatedly raised concerns about severe impacts flowing from a No Deal exit, and the temporary, partial and incomplete nature of the Government's mitigations. Operation Yellowhammer, the cross-government civil contingency No Deal planning effort across Whitehall represents a significant acceleration of No Deal preparations following a £2.1bn injection of cash. However, many businesses leaders have expressed that this is simply "too little too late".¹²

⁷ Locke, *Second Treatise of Government*, 1690

⁸ In order to keep the scope of this paper manageable this paper does not propose to explore the various formulations of the Rule of Law in detail: a cursory glance at citations in Westlaw for the "Rule of Law" includes 134,104 journal citations, and therefore this paper is limited to general principles used within 'thick' conceptions of the Rule of Law as proposed by Tom Bingham and which underpins the work of the Bingham Centre in general.

⁹ M-RCBG Associate Working Paper No. 77, [Making Brexit work for British Business: Key Execution Priorities](#), Peter Sands, Ed Balls, Sebastian Leape, Nyasha Weinberg, 2017

¹⁰ Institute of Directors, [Businesses should step-up no deal preparation](#), June 2019

¹¹ CBI, [No-deal Brexit is a tripwire into economic chaos](#), July 2019

¹² FT, [Is business right to still fear a no-deal Brexit?](#), August 2019

Structure of the Paper

Chapter 1 offers an overview of the legal implications of No Deal that are prominent for business to ground the evidence and subsequent discussions about the impacts for business.

Chapter 2 gives evidence from businesses about the impacts of No Deal of a Rule of Law nature,

Chapter 3 examines specific sectors and areas of commerce affected by Brexit with a Rule of Law component.

Chapter 4 considers in more depth the consequences for the Rule of Law of the issues and themes raised in the first three chapters.

Chapter 1: What are the legal implications of a No Deal exit?

To fully understand the legal implications of a No Deal Brexit it is important to understand the legal framework that will kick into action on Exit Day. Below we set out the headline legal issues but any reader may wish to supplement this section with further detail contained in previous reports from the House of Commons Library,¹³ reporting from the UK Constitutional Law Association blog,¹⁴ and the transcripts of significant Brexit-related court cases.¹⁵

Retained EU Law

In the event the clock runs down on Article 50 and the UK leaves the EU without a deal, the EU (Withdrawal) Act 2018 ("EU(W) Act 2018") ensures that the UK will not be left in a legal vortex. The EU(W) Act 2018 repeals the European Communities Act 1972, bringing all EU laws onto the UK statute book, creating a new category of 'EU retained law' in the process.¹⁶

The status of EU law brought into UK law varies according to the source of EU law and falls into three new categories of domestic equivalents. However, these categories do not align with the various sources of EU law as retained in the treaties with the risk of creating confusion for stakeholders in identifying the newly transposed law and how it will operate.¹⁷ The three categories protected by the EU(W) Act 2018 are first, EU derived domestic legislation, including primary legislation aimed to bring into effect EU directives. Second, some 5,000 directly applicable EU regulations which will be converted into UK law and third, directly effective residual rights, powers, liabilities obligations, restrictions, remedies and procedures are protected.

EU law that will no longer apply

However, the EU(W) Act 2018 does not amount to a wholesale transposition of EU law. Elements that are not transposed include the Charter of Fundamental Rights of the European Union, the principle of supremacy of EU law (for prospective legislation), and the end of Member State obligations under the treaties, the supremacy and direct effect of EU and the administrative mechanisms by which these are imposed - e.g. the *Francovich* principle of state liability. By bringing the principle of the supremacy of EU law to an end for legislation enacted after exit day, aspects of EU law that have been retained will no longer have supremacy over all domestically derived law or regulations. For further details on the status of each category of EU law the House of Commons Library has provided a helpful primer on this topic.¹⁸

Delegated Legislation Powers

In addition to a vast translation of EU law the EU(W) Act 2018 also gave ministers a number of new time-limited delegated legislation powers, so called 'Henry VIII' powers. These enable ministers to make changes to primary and secondary legislation using statutory instruments ("SIs"). This is because transposing EU law into UK law is much more complex than the 'copy and paste' description would suggest. Some EU laws if transposed directly into the UK lawbook would not be able to function as intended, chiefly because the UK will no longer be a Member State of the EU. Any references within those laws to Member States would therefore cease to function for the UK. A 'storm' of SIs has been

¹³ House of Commons Library, [What if there's no Brexit deal?](#), February 2019; House of Commons Library, [The Status of Retained EU law](#), July 2019

¹⁴ UK Constitutional Law Association, [Blog](#)

¹⁵ [R \(on the application of Miller and another\) \(Respondents\) v Secretary of State for Exiting the European Union \(Appellant\)](#), [2017] UKSC 5

¹⁶ House of Commons Library, [The Status of Retained EU law](#), July 2019

¹⁷ European Futures, [Amending Retained EU Law after Brexit](#), October 2018

¹⁸ *Ibid.*

needed to correct these deficiencies. So far, around nearly 650 SIs have been laid, with many of these significantly altering the manner in which businesses are regulated post-Brexit.¹⁹ The question of whether proposed levels of alteration fall within the purposes for which the SIs have been created as outlined in s.8 and s.9 EU(W) Act 2018 is discussed in more detail in chapter 4.

Brexit Related Legislation

Beyond the EU(W) Act 2018, the Government has enacted a significant tranche of Brexit-related legislation to resolve specific sectoral issues. Government has made statements that all necessary primary legislation to prepare for No Deal has been enacted, although this is a contentious issue.²⁰

The IfG's tracker of the legislation needed to implement Brexit covers bills that have already received royal assent, such as the Nuclear Safeguards Bills and the Taxation (Cross-border Trade) Bill alongside those acts that are yet to pass the Lords and Commons stages.²¹ Even before prorogation, the IfG identified that in seven Brexit-related policy areas the relevant bill had not made it through both stages and looked unlikely to be passed ahead of a No Deal exit.

The Government's decision to prorogue Parliament demonstrated that the Government was willing to abandon the five 'Brexit Bills' before exit day.²² The Five Brexit bills: the Fisheries Bill, the Trade Bill, the Financial Services Bill, Immigration and Social Security Bill and Agriculture Bill, now look highly unlikely to continue their progress through Parliament before an election. These bills will now need to start their journey through Parliament from scratch after the new Queen's Speech which now looks likely to take place on the 15th October.

The Johnson government has stated that these bills are not needed in advance of a No Deal exit, with Stephen Barclay stating that these were no longer necessary.²³ However, the passage of these bills takes time, and many of the issues contained within will be important for business in the event of a No Deal exit. For example, without the passage of this legislation the Government will not be able to repeal free movement, enact its new domestic scheme of public subsidies to farmers or give regulators the power to update UK rules regulating financial services in line with those of the EU, among other things. Thus, the importance of issues covered by the bills, and the fact that other government Ministers have previously emphasised the necessity of some of this legislation, suggest that these bills may be needed in the short term immediately after a no deal exit.²⁴

If these bills cannot be passed through by primary legislation before Exit Day, the Government will have to face a difficult decision about whether to push through the changes by SI or face the disruptive consequences for stakeholders such as businesses of abandoned plans.

As chapters 2 and 3 explain our interviewees suggested that despite Stephen Barclay's claim, the legislation and statutory instruments in place to prepare for no deal are not sufficient to set out a stable, clear legal framework that is compliant with the Rule of Law.

Trading Relationships under No Deal

In a No Deal context Britain will lose its access to the single market and frictionless trade with the EU. Outside the EU, the UK's trading rules would be governed by the World Trade Organisation ("WTO"), and trade with the EU will be subject to the full range of regulatory checks. As the UK's trade rules are currently bundled with those of the EU the UK needs to agree separate trade schedules with both EU and third country trading partners under the General Agreement on Tariffs and Trade ("GATT") and the

¹⁹ Linklaters, [Brexit SI Tracker](#)

²⁰ Hansard, [Topical Questions](#), June 2019

²¹ IfG, [Parliamentary progress of legislation introduced to implement Brexit](#), July 2019

²² Politico, *5 Brexit bills that fell victim to UK parliament shutdown*, Gallardo and Rosca, September 2019

²³ Hansard, [Topical Questions](#), June 2019

²⁴ BBC, [What laws have been lost after Parliament's suspension](#), September 2019

General Agreement on Trade and Services ("GATS").²⁵ This process is likely to take a significant amount of time to complete, with considerable expense for business in the interim.

There has been considerable discussion about whether the UK may be able to bilaterally agree tariff-free access to EU markets under XXIV of GATT. While the UK is able to offer tariff free access to the EU for a significant number of its goods under XXVIII:3(a), an approach confirmed by the Government's publication of its proposed temporary tariff regime,²⁶ the EU would be unable to reciprocate unless it was happy under Most Favoured Nation ("MFN") principle to offer the same tariff-free access to all other non-Member States. The likelihood of this is extremely low. Consequently, businesses will have to shoulder the cost of the full panoply of checks and tariffs. The impact of these additional costs on business, and the potential for significant damage, have been explored in a range of publications.²⁷

Also impacted by a No Deal Brexit will be the status of the UK's external trade with third-countries which have preferential trade agreements with the EU. The EU has a trade deal with more than 50 countries. As a Member State of the EU, the UK is a party to these agreements; although this will cease under a No Deal Brexit, requiring the UK to negotiate and conclude bilateral agreements with each in turn. The UK has already completed a number of these, but the Government has set out 24 deals which remain under negotiation, including with countries such as Turkey and Canada with which the UK conducts around 3% of its trade. Concluding trade agreements is a lengthy process - for example the Canada - EU Comprehensive Economic and Trade Agreement ("CETA") took seven years to conclude; business groups are not holding their breath for these agreements to be concluded in the near future.

Finally, the Trade Bill initially introduced by Theresa May's government in 2017 ended up getting stuck following a rocky passage through the Commons and Lords and will need to be re-introduced in a new Queen's Speech, if it is reintroduced at all. The bill proposed to create powers to transition trade agreements, ensure access to lucrative public sector contracts and procurement opportunities overseas and establish a new independent UK body the Trade Remedies Authority to defend UK businesses against unfair trade practices.²⁸ Amendments to the bill made by the Lords gave Parliament the right to consult on and approve any new agreements.²⁹ Even though the Government could legislate post-No Deal for these capabilities, the uncertainty casts a further shadow over the shape of the UK's future trading relationships.

²⁵ Treaty on the Functioning of the European Union (TFEU) arts 3(1)(e) and 207(1).

²⁶ Gov.uk, [Temporary tariff regime for no deal Brexit published](#), March 2019

²⁷ UKTPO, [Brexit and global value chains: 'No-deal' is still costly](#), July 2019

²⁸ Parliament, [Trade Bill: Explanatory Notes](#), November 2017

²⁹ Parliament, [Trade Bill: Explanatory notes on Lords amendments](#), March 2019

Chapter 2: Rule of Law Impacts

The following chapter teases out the overall impacts of a No Deal Brexit on various facets of the Rule of Law, including certainty, clarity and democratic input. Given the prestige historically attached to the UK's legal and political order, it also covers the overall impact of this constitutional upheaval for the wider perceptions of Britain's legal system, and activity that depends on the UK's reputation as a 'safe' place to do business.

Rule of Law principles triggered by No Deal Brexit

This section considers the impact of a No Deal Brexit for the different components of the Rule of Law. Rather than dealing with each aspect separately, this paper considers these concepts together as they are all important, interrelated, core aspects of the Rule of Law as it relates to business. Tom Bingham's book on the Rule of Law gives a good summary of the interplay between these principles:

*"[T]he successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. No one would choose to do business, perhaps involving large sums of money, in a country where the parties' rights and obligations were vague or undecided."*³⁰

Therefore, in circumstances where a person or entity subject to the law does not know what the relevant applicable law *will* be at a specific point in the future, issues of accessibility, clarity, predictability and certainty are all triggered, hence the interrelatedness of these concepts when a No Deal Brexit is at stake.

Nevertheless, it is worth exploring each of the subcomponents of the Rule of Law in a little more detail to understand how a No Deal Brexit could affect their realisation. Legal certainty, and the closely related concept predictability relates to the need for companies know which rules will be governing their business. A key distinction here is between the knowledge that the UK is likely to depart *from* the EU's legal regime in certain fundamental (but undefined) ways under a No Deal scenario, and the knowledge that the UK is going to depart *from* a specific position, *to* a particular (and sufficiently clear) position following Exit Day. Stability, which is closely related to certainty, relates to the law containing stable set of precedents which can be relied upon by entities such as business when preparing for the future.

A central expectation for business under the Rule of Law is that their activities will be governed by a clear, and easily understandable set of legal norms, providing 'clarity'. Clarity is usually said to be an issue where it is obvious that there are laws, but it is not possible to determine what they say. Examples applicable to multi-national businesses in particular include where the "law" is mostly arbitrarily enforced, or where laws are contradictory. Accessibility relates to clarity and is about the ability of a user of law being able to know what the relevant applied law is. For businesses, these 'clarity' aspect of the Rule of Law ensures that their activities are guided by unequivocal, known, external rules which make clear what is expected of them. Clarity of law is a fundamental requirement for business action and investor confidence, and there is significant evidence to suggest that the clarity of the UK's legal system has played a causal role in the favourability of the UK as a destination for business, and have operated as a driver of growth.³¹ By instigating a wholesale change of the source of law in the UK a No Deal Brexit gives rise to significant questions about legal clarity.

In the classic liberal tradition, the 'source of the rules' is a fundamental dimension of the Rule of Law; laws should be based on consent, and authority based on democratic decision making. Bingham explains this when he states "that all persons and authorities within the state, whether public or private,

³⁰ Tom Bingham, *The Rule of Law*, 2011, Penguin Books: London, at p. 38.

³¹ Gov.uk, [UK Legal Services on the International Stage: underpinning growth and stability](#), March 2013

should be bound by and entitled to the benefit of laws publicly made".³² Areas in which the UK has pledged to retain EU rules without concomitant input into rulemaking call into question this issue of democratic input.

Below we explore the impact of a No Deal Brexit on these Rule of Law principles; both in terms of the legal frameworks that will apply on Exit Day, and for the months and years thereafter.

Obtaining certainty around the future operating environment is a top priority

All of those we spoke to named certainty as one of their main priorities and one of the key issues they were concerned about in relation to a No Deal Brexit. The general sense was that the maelstrom of issues created by an abrupt departure would lead to a series of changes with operational and logistical consequences, which no amount of forward planning could effectively mitigate.

"There is a strong sense of uncertainty and a lack of clarity about whether the UK is going; this creates a sense of disquiet"

For many businesses, the lack of certainty was already taking its toll on confidence: with decisions becoming significantly riskier, and many choosing to freeze spending, and delay other decisions while awaiting further information about Brexit. In particular, the lack of knowledge of the future legal frameworks was leading to the deferral of decision making.

"Lack of visibility means that we are taking decisions on a knife-edge"

Some businesses reported a worsening of external perceptions of Britain as a place to do business; a view that accords with recent polling data on investor sentiment.³³ Other decisions around Brexit, including the UK's compliance with the terms of the divorce settlement, also have the capacity to significantly alter the UK's standing as a reliable international partner.³⁴

"We need to demonstrate to our headquarters that the UK is a good place to invest, but this is really difficult with the ongoing uncertainty. We are still in the same position as last March - the prospect of a No Deal and that of a further extension both remain on the cards"

Interviewees described how the lack of clarity has had downstream impacts for many areas relating to business confidence including the future of sterling, the continued operations of supply chains and disruptions to proposed foreign investment. Many of these issues clearly have their roots in issues yet to be resolved around the post-Brexit legal framework.

Timeframes are extremely short by business standards

The impacts on business confidence are exacerbated by the rapid swings in likely Brexit outcomes. Many of the significant recent decisions on Brexit, such as passage of the 'Benn Act', and Supreme Court decision on prorogation have taken place within just a few weeks. These timeframes are not the way that business operates; and assaults decision makers with a huge range of different outcome scenarios; provoking a proliferation of odds-based scenario modelling by political experts. The consequence of many being left on "standby" is already a failure from the Rule of Law perspective as it denotes a level of unpredictability which severely undermines legal certainty.

³² Bingham, The Rule of Law, July 2011

³³ CBI Business Optimism Indicator, quoted in [Trading Economics](#)

³⁴ FT, [No Brexit deal, no money?](#), September 2018

Some businesses gave assurance that the European Union (Withdrawal) Act 2018 (“EU(W) Act 2018”) provided short term guidance as to the broad legal frameworks for business operations

The EU(W) Act 2018 converts EU laws into domestic laws in areas as diverse as environmental regulation, workers’ rights and financial services regulations. The retained EU law created by EU(W) Act 2018 will come into effect on Exit Day - now the 31 October 2019. This helps to avoid the emergence of a gaping hole in the UK’s statute book following a No Deal exit and confirms that many law will, in their intent and effect, be the same as those to which business is currently subject.

Our interviewees confirmed that the intended effect of the EU(W) Act 2018, namely certainty over which law would apply, had functioned as intended. This certainty has also been bolstered from the EU-side by the No Deal legislation from the latest Commission Communication, particularly on extending time limits.³⁵ Many of the businesses we spoke to were reasonably confident about the operation of the EU(W) Act 2018 and felt they had clarity about the legal framework that would operate in the period immediately following EU exit. It was widely understood that the EU(W) Act 2018 creates a domestic basis for the EU rulebook.

“In many ways while uncertainty around Brexit is a big issue, uncertainty in terms of the legal framework is less immediate.”

Companies described that in the short-term, the retention of, in effect, almost all UK laws has enabled business to make significant preparations for Exit Day. It should, however, be noted that the increase in tensions between the UK Government and Parliament, and the EU, have raised the spectre of wider political disruption that threatens to undermine certainty in the operation of the EU(W) Act 2018.

Many companies concerned about the legal impacts of leaving the single market, and took action to restructure their businesses to address potential barriers to trade.

Despite the view that the EU(W) Act 2018 provided a short-term sense of legal clarity, those we spoke to were much less certain about the legal issues that would arise in areas that require reciprocity between the UK and EU. The UK has, in several areas, promoted unilateral adherence to EU rules but without the EU’s recognition of the UK’s rules, they do not facilitate cross-border business. A recent example of this phenomena has been the plea of Andrew Bailey of the Financial Conduct Authority’s (“FCA”) that the EU grant the UK equivalence and supports market access.³⁶ Without such reciprocity business that active exporters or importers face the emergence of non-tariff barriers resulting from a lack of regulatory harmonisation, the need for multiple licenses and rules of origin. The rhetoric, and confusion over a No Deal outcome means that many businesses did not feel sighted on whether these barriers would emerge.

One example that arose throughout the interviews post-Brexit divergence. We were told how many had no idea of the extent to divergence would take place, and the measures that businesses undertook to reduce exposure to the risk that once free of European Treaty obligations the UK would be freed to diverge and accrue non-tariff barriers to trade. Some companies had undertaken significant internal restructuring to minimise the No Deal disruption.³⁷

“Banks took a conservative view, and to ensure they could continue servicing clients, broker-dealers set up entities in the EU”.

This points towards a wider trend of business taking action to anticipate problems and take pre-emptive action. The larger businesses we spoke to acknowledged that this nimbleness and agility was a function

³⁵ European Commission, [Brexit ‘no-deal’ preparedness: Final Commission call to all EU citizens and businesses to prepare for the UK’s withdrawal on 31 October 2019](#), September 2019

³⁶ FCA, [Preparing for Brexit in financial services: the state of play](#), 16 September 2019

³⁷ We explore these impacts for financial services in more detail in the following chapter.

of their size; and stressed that many of their suppliers, generally smaller firms, might not have the same ability to be responsive in this way.

“We are worried about the robustness of our supply chain”.

Although the companies we spoke to were keen to stress the minimal damage sustained to the UK parts of their business as a result of these changes, it was inevitable that these moves would entail some transfer of people, capital and expertise from the UK to the EU.

“To ensure our products got the right sign-offs we moved the design authorities and therefore the authorisation process to Germany. While this doesn’t change much from a cost and people perspective, it may change the stamp saying ‘Made in Britain’.”

Our interviews suggested that the transfer of operations may accelerate should a No Deal exit occur. Some firms said they were ready to move operations overseas but were waiting for a resolution to the politics before taking decisive action.

“We may move some operations to avoid trade frictions, but we are waiting until we know the outcome.”

Exit will require business to obtain new clearances to export to the EU

For many businesses, new regulatory and legal burdens are likely to accompany a No Deal outcome. For example, the export of controlled products into the EU does not currently require a licence. Should the UK leave the EU without a deal, a licence would be required for the export of items to EU countries.

“We realised there were a series of things we would need to be ready for, including the need to get the right licences from European authorities.”

The ability to adapt to the new administrative complexity by moving operations is a function of the level of risk-appetite, understanding and resources available to address these types of issues. For small firms this may not be feasible, a fact that the Government has recognised by offering compensation to affected companies, with some suggesting that government compensation could cost up to £22bn.³⁸ The question of which firms would be in receipt of bailouts from the Government, at whatever level they are ultimately set, will require a significant amount of scrutiny in order to avoid violating Rule of Law principles around equity and transparency. Alongside these risks is a general business concern about government’s underlying capability to address these issues at all.

“There is a huge amount of uncertainty in government around licenses and permissions regimes. It seems that government isn’t ready to cope with the complexity of transactions after No Deal. This will be made worse by the wider chaos that government is likely to be in.”

Some companies identified specific pieces of Brexit-related legislation that had not successfully been concluded and left a lack of certainty around the future policy direction.

Some of our interviewees mentioned bills that had stalled in Parliament. For example, none of the Immigration Bill,³⁹ the Fisheries Bill,⁴⁰ nor the Agriculture Bill,⁴¹ respectively designed to make provisions for policy objectives in relation to migration, agriculture and fisheries, have made it through

³⁸ Independent, [No-deal Brexit will cost £22bn a year to compensate businesses, landmark analysis reveals](#), July 2019

³⁹ [Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill 2017-19](#)

⁴⁰ [Fisheries Bill 2017-19](#)

⁴¹ [Agriculture Bill 2017-19](#)

to Royal Assent. For businesses operating in sectors where these bills are central to operations, this has raised doubts as to whether they will have any security about the regime in which they operate. We explore these in more detail in our second chapter on sector-specific issues.

“There remains significant uncertainty around the progress of the Fisheries Bill, owing to the difficult Parliamentary arithmetic. It seems that the essential powers for ministers to set quotas and access will probably get onto the statute book in time, but that the full Fisheries Bill may not get through ahead of No Deal. Consequently, we are worried that all the details around fisheries management and landings obligations will be lost.”

Many of the issues that were raised were of second-order importance, and there was a general sense that the Government would not leave a total lacuna in a strategically important area. However, these findings point to a more general issue that affects all aspects of Brexit-related law: namely the short notice and the difficulty of getting the details right in the limited time-period available. Daily business operations, including cross-border shipments and orders, are often planned years in advance. In contrast, Brexit developments take place daily, and mere weeks before Brexit there is still no clarity regarding the legal regime to be applied on 1 November around the abandoned Brexit bills. Increasingly, the expectation that Government will have time to dedicate to the details of any remaining strategically important lacunae seems unrealistic.

Some of the Statutory Instruments (SIs) passed to prepare for No Deal were not fit for purpose

Businesses raised concerns about whether relevant statutory instruments will be in place by Exit Day. The large volume of law requiring ‘correction’ under the EU(W) Act 2018 has led government departments, already stretched by Brexit, to push through a raft of Brexit-related SIs at short notice to prepare for a No Deal outcome. This process has created a significant burden on government departments, ill-equipped to deal with the task given resource constraints and high turnover levels.⁴²

Those responsible for the policy and drafting have been under severe pressure: the BBC’s Newsnight reports that in early 2019 1,355 civil servants were moved from Whitehall departments into emergency No Deal planning teams.⁴³ Unsurprisingly, given the volume of legislation and the churn of civil services, business have raised issues with the SIs that have already been laid; and this raises wider question about the quality of SIs in other policy areas impacted by the loss of experienced officials and wider Brexit disruption.

For example, experts in the chemicals sector have set out concerns with the practical unworkability of earlier drafts of the SI in relation to chemicals regulation, which has now been updated twice.⁴⁴ The Brexit SI for the allocation of international haulage permits which was found to “imperfectly achieve its policy objective”.⁴⁵ Another issue has been the lack of adjustment of the SI to the needs of UK businesses can already be seen in the excessive adherence to the ‘cut and paste’ approach - the draft State Aid regulations still contain a de-minimis threshold specified in Euros, rather than creating a new threshold in GBP sterling. This provides specific evidence of failure of purpose of EU(W) Act 2018 provision 8(2)(g) enabling SIs to adapt EU law which contains “EU references which are no longer appropriate”.

For business there are real concerns that the muddle of SIs creates a lack of clarity and certainty around the law that will apply. Moreover, there are significant worries that due to the evolution of EU law, some of the SIs will be out of date by the time Exit Day arrives, as the EU law from which the SI has been created will have itself been updated.

⁴² Dudman, [Think Whitehall with help get us through Brexit? Think Again](#), Guardian, Jan 2019

⁴³ Chu, [Brexit: Civil servants moved around fo no-deal plans as deadline shifts](#), July 2019

⁴⁴ Bootmanchem.com, [Changes to UK REACH Statutory Instruments](#), June 2019

⁴⁵ House of Lords, [Work of the Committee in Session 2017–19: Second Interim Report](#), 11 June 2019

The need to pass laws in preparation for Exit Day places the Government in a significant Rule of Law bind, facing failure to implement the necessary SI before exit date, or failure to adequately scrutinise a piece of legislation. We discuss this tension in more detail in Chapter 4. A second Rule of Law consequence is around accessibility: the publication of statutory instruments and subsequent withdrawal of a small subset of these has happened at such speed that this has made it difficult to access a clear statement of law that is likely to apply on Exit Day.

Over the medium-term business are uncertain about the likelihood and extent of regulatory divergence, and are concerned about the loss of UK influence over EU rulemaking

Following a No Deal exit the UK will no longer participate in the EU regulatory architecture. For firms which are dependent on cross-border trade with the EU the prospect of UK regulatory divergence from EU rules poses a risk of increased non-tariff barriers to trade. Most businesses expressed a strong preference for alignment, consistent with previous surveys on this topic.⁴⁶ The prospects for divergence will be dependent on a range of factors, including whether the UK chooses to strike a trade deal with the US, differences with the EU in terms of the approach to regulation and ongoing Parliamentary instability. If Johnson's plans for divergence come to fruition many are worried that this will impact future trade talks, and cross-border trade in the interim.⁴⁷

"It doesn't seem that the Government has properly applied its mind to the question of areas in which regulatory divergence should / shouldn't take place"

What is also unclear to many in the business community is the areas in which regulatory divergence will take place i.e. which are the priority areas for new regulations, or issues where government particularly wants to depart from the EU position.

"We need to understand how the regulatory architecture is going to take place after Brexit, but right now we are not even certain of the rules of the game, and the practical possibilities for trading across borders in the event of a No Deal Brexit"

These issues are most profound for businesses with globally integrated supply chains; and those which are reliant on smaller suppliers within that supply chain who may be less able to adapt to regulatory change.

"As a global multinational we are habituated to flux and while it creates another headache we think we can manage it. But for the supply chain there are huge issues, from regulatory change, not least because many are not even properly thinking about the changes on the horizon. We have a voluminous, long and complex supply chain, and our business continuity risk management for Brexit is increasingly taking into account the robustness of supply chains".

Some firms have pointed out that regulatory divergence is most likely to take place in a scenario where the UK concludes a trade-deal with the United States following a No Deal exit.

"If regulatory divergence means convergence with US standards, we will see a deterioration in the quality of regulation"

One of our interviewees described that their company anticipated that conflict of laws capabilities that they had developed in order to deal with issues arising in non-EU export destinations may be needed

⁴⁶ M-RCBG Associate Working Paper No. 77, [Making Brexit work for British Business: Key Execution Priorities](#), Peter Sands, Ed Balls, Sebastian Leape, Nyasha Weinberg, 2017

⁴⁷ FT, [EU warns Johnson plan on rules divergence will hinder trade talks](#), September 2019

for activities in the EU. They were confident in their ability to deal with conflict of laws issues but raised doubts about the ability of some of their suppliers to prepare for the related legal complexities.

“Conflicts of laws issues will emerge as regulatory divergence takes place.”

Above all, firms were keen to stress the importance of the UK retaining its influence over rules and standards in the event that the UK regime remained tied to the EU. There was a lack of confidence that the UK government had a plan for influencing EU laws outside of the EU.

“We are worried about being bound by regulations we cannot influence any longer.”

For some industries, most notably financial services, establishing a market access agreement is crucial to the sector’s ongoing success. For others such as the life sciences, regulatory alignment is critical for the ongoing operation of highly integrated supply chains. We explore some of the impacts for sectors where there are specific legal impacts from divergence in the second chapter, which is focused on sectoral issues.

In some circumstances the emergence of new, parallel areas of UK law will add additional legal complexity

Global exporters operating from the UK currently have to ensure compliance EU sanctions regimes, as well as US sanctions regimes if applicable. The emergence of a UK specific sanctions regime following a No Deal will create additional complexity.

“While on the whole we expect a new UK sanctions regime to be pretty similar, it won’t be exactly the same; and now businesses will have to cope with applying UK, EU and US sanctions simultaneously”

Some businesses raised concerns about the future enforceability of judgments.

Business we spoke to were aware that some assurance had been provided around the future enforceability of judgments, but were concerned that this would become considerably more complicated than under the present regime.

“We are somewhat worried about enforceability post Brexit, and the risks that Brussels [Recast Regulations] will no longer apply.”

This speaks to a wider concern that unless the UK’s enforcement regime is simple, it may have knock-on impacts on UK business. This enforcement question is important both for the Rule of Law and for maintaining London as one of the international legal services centres”.⁴⁸ Work has been done at the UK and EU level to clarify the process for enforcing judgment: the UK has passed secondary legislation setting out its enforcement process for foreign judgments, and has sought independent accession to the Hague Convention.⁴⁹ The EU has set out its own policy for private international law in a No Deal scenario.⁵⁰

While the current regime, the Recast Brussels Regulation, ensures that a “judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member State without any declaration of enforceability being required” the new regime requires litigants to undertake a range of procedural and substantive steps to enforce judgments efficiently.⁵¹ Without the Recast Brussels

⁴⁸ Lord Chief Justice for England and Wales, [English law on the world stage](#), May 2019

⁴⁹ The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 and the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019

⁵⁰ European Commission, [Notice to Stakeholders, Withdrawal of the United Kingdom and EU rules in the field of Civil Justice and Private International Law](#), January 2018

⁵¹ Hogan Lovells, [The latest view: Enforcement of judgments post-Brexit in event of a No Deal scenario](#), May 2019

Regulation remaining applicable, the position of UK courts as the preferred forum for international disputes looks to be in jeopardy. The view is reinforced by the recent European Commission guidance note encouraging other EU jurisdictions to develop forums for international disputes.⁵²

Under a No Deal Brexit the role of the ECJ remains unclear

Stable legal rules are essential to the Rule of Law. However, it remained unclear to businesses the extent to which legal decisions would be based on stable foundations, i.e. to what extent will UK courts be bound by the ECJ's reasoning. This contrasts to the Withdrawal Agreement that explicitly sets out the need for consistent interpretation of ECJ case law until the end of transition, and the need to pay "due regard" to the case law thereafter.⁵³ We know that litigation initiated after Brexit generally won't entail references to Luxembourg - but there is a question of how much reliance should be placed on the jurisprudence of Luxembourg courts, both directly, and as cited in cases by the UK's highest courts. Again, the Withdrawal Agreement is much clearer on this issue: for example if the WA were to come into force, it has provisions such as for citizens' rights issues the UK courts will be able to send preliminary references to the ECJ for a period of 8 years after the end of the transition period.⁵⁴

Under the first clause of the EU(W) Act 2018 the European Communities Act 1972 is repealed on Exit Day. Linked is the revocation of the need for UK courts to follow the judgments of the ECJ. Under the EU(W) Act 2018 the courts will no longer be able to refer anything to the CJEU (s.6(1)) and will no longer be bound by its case law. While under s.6(3) retained law is to be decided "in accordance with any retained case law [pre-Exit Day] and any retained general principles of EU law" provided that the law is "unmodified". Under s.6(4) of the Act the Supreme Court in the UK is not bound by this case law and should treat this law according to the same principles as if it were deciding to depart from its own case law.

During evidence to the Select Committee on the Constitution Lord Neuberger and Lady Hale set out that despite the provisions of the EU(W) Act 2018 there is still a need for further clarity on the role of the ECJ. Specifically, that there is a need for it to be made plain "in statute what authority or lack of authority, or weight or lack of weight is to be given to the decisions of the Court of Justice of the European Union after we have left, in relation both to matters that arose before we left, and, more importantly, to matters after we leave".⁵⁵ The requests of the (former in the case of Lord Neuberger) Supreme Court justices suggest that the court is wary of becoming a battleground over the status of retained EU law in a No Deal Brexit, with their requests that Parliament should give more information and that judges not be blamed for misinterpretations of unclear law.⁵⁶

Other Rule of Law Impacts

For many businesses the idea of the Rule of Law extends beyond formal elements such as the particular requirements of legal norms, to encompass a general sense of constitutional stability, legal accountability by those in power, human rights and the consistent application of legal norms. This follows the philosophical 'thick' definition of the Rule of Law that embraces within its scope a wide spread of considerations around governance. These wider concerns arose over the course of the interviews conducted for this project and are reflected below.

The perception and standing of British business has deteriorated with Brexit

For many of UK-headquartered businesses that we interviewed trading under the British 'brand' has been a fundamental part of the overseas cache. They felt, particularly with the prorogation of Parliament,

⁵² Law Society Gazette, [How no-deal with affect UK courts](#), September 2019

⁵³ European Commission, [Brexit Negotiations: What is in the Withdrawal Agreement](#), November 2018

⁵⁴ Gov.uk, [Explainer for the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union](#), November 2018

⁵⁵ Parliament, [Select Committee on the Constitution European Union \(Withdrawal\) Bill](#), January 2018

⁵⁶ BBC, [UK Judges need clarity after Brexit – Lord Neuberger](#), August 2017

that many of their clients in overseas locations were taking a less favourable view of the UK and were more cautious about its position as a stable business environment.

“We depend, especially when we are working in jurisdictions with Rule of Law issues, to invoke British law-making, although this has become increasingly difficult in recent months.

For some Irish businesses the highly integrated nature of their supply chains and customer base mean that No Deal represents a significant threat to their viability.

In Northern Ireland, the potential for the re-establishment of a border between the North and the South has created significant difficulties for business; especially as government No Deal planning has been put in place.

“Companies based in the Republic of Ireland have been told to ‘de-risk their supply chains’. The consequence of which is that customers and businesses in the Republic have therefore reoriented away from Northern Irish businesses, anticipating that Brexit will create issues if they continue to do business across the border.”

The prospect of a No Deal Brexit has introduced uncertainty about the future of the legal system and status of the Irish border, which has had downstream effects on business confidence and investment.

“There has already been a lack of inward investment because people don’t know what the rules are going to be, and how they can grow their business on the north side of the border.”

“this is an all-Ireland business economy. Any differential in terms of loss of time at the border or filling out forms is going to hurt small businesses”

Many businesses have therefore seen their viability threatened by a disruption to flows across the border. Given that a majority of Northern Ireland voted to remain within the European Union, and the impacts to businesses have already been seen, interviewees perceived the general feeling to be one of a community that will be severely negatively impacted by an abrupt departure. This could threaten overall levels of compliance with the law, particularly for those businesses that face existential threat from the disruption.

“For many businesses trade is done equally on both sides of the border, and both Ireland and Northern Ireland form part of the ‘hinterland of business operations [...] Many small businesses will not comply with the regulatory framework, refusing to adapt to the law if No Deal hurts them. They simply won’t follow arrangements that don’t make sense”.

Regulatory divergence also creates the potential for price differentials across the border which some are concerned may increase smuggling.

“A No Deal situation will ‘turbocharge’ smuggling. At the minute the three goods that aren’t in regulatory alignment across the border – fuel, alcohol and tobacco, are smuggled in significant quantities. Last year, for example, revenue and customs lost about £40m to fuel alone”.

Wider concerns about the Rule of Law from a No Deal exit are particularly acute in Ireland due to the potential impacts for the Good Friday Agreement.

Impacts to the Good Friday Agreement from a No Deal exit creates a live issue for the Rule of Law. If public confidence that the law is fair, impartial and coherent starts to erode, levels of compliance with the law are likely to fall dramatically. Successful business environments are built on a foundation of trust that the law operates effectively; and a decline in that trust have significant consequences. One interviewee pointed to that way in which customs outposts were a target for terrorism during The Troubles to emphasise how laws without widespread buy-in can stoke problems and resentment.

“In 1972 the Provisional IRA planted a bomb at a customs office in Newry killing 6 civilians and 3 IRA members. Customs was a symbol of partition. The Good Friday Agreement understood multilateralism and recognised the realities of East-West / North-South and Protestant-Catholic relationships. Lose the sharing of sovereignty under the EU and the prosperity it has brought, and with it you will lose the trust of the professional and business classes, and their confidence in the Rule of Law”.

The risk of smuggling has also been identified as a driver for an increased border presence with impacts for business.

“Police will not be able to turn a blind eye to smuggling. You can have all the technological solutions and satellite systems, but someone will have to stop vehicles. We are concerned that this will stoke confrontations. Nobody will start with the intention of creating a hard border, but feet on the ground will be needed to enforce the regulatory differences”.

Overall, therefore, the threat posed by a No Deal Brexit to stability has dispersed impacts for the Rule of Law; policy- and law-makers should remain alive to the overall risks to the Rule of Law in the UK and overseas.

Chapter 3: Sectoral Impacts

This chapter sets out in more depth some of the risks to the Rule of Law that have emerged in particular sectors of the economy, and around particular issues. Below we cover a range of these that arose over the course of our interviews. This is not an exhaustive list of all of the legal implications of a No Deal Brexit, but rather a series of challenges to the Rule of Law raised by those we interviewed as they relate to certain sectors and areas of business activity. While we cannot cover everything, we do hope to highlight some priority areas and elucidate general Rule of Law risks.

Before diving into the detail, it is worth setting out that many of the immediate risks stem from three distinct sources. First, Rule of Law risk emanates from areas in which the UK Parliament has not yet legislated. As a result, the future direction of policy on areas essential to business operations has yet to be determined, for example, on migration. Second, issues that stem from uncertainty about EU and Member State actions, such as whether the EU will grant that UK an adequacy decision for data flows. Third are uncertainties that arise from the prospect of regulatory divergence, an issue raised in the previous chapter. These risks do not fall into neat categories for sectors; as the analysis below demonstrates, many of the issues result from a confluence of these risks.

Lack of clarity and certainty in specific sectors

At this ‘lively’ moment (in the words of John Bercow) in Parliament’s history, and with the prorogation of Parliament, the clock is continuing to run down on a tranche of ‘Brexit’ related legislation.⁵⁷ In the emergency Miller/Cherry hearing the submission for the Shadow Attorney general contained a list of 13 bills that were in Parliament before prorogation. As mentioned in Chapter One, of these, five Brexit Bills could in theory be re-introduced into Parliament.. However, the Government is unlikely to schedule further stages on these Bills until there is a major change to current parliamentary situation, which seems impossible. Major primary legislation in any of these areas will require a solid majority in the House of Commons, and it is therefore likely that primary legislation would have to come after a No Deal exit, which is a possibility.⁵⁸

Of the range of future issues over which legal certainty and clarity is yet to be obtained, citizens’ rights and financial services are two of the most important issues for business; financial services because it contributed 15% of the UK’s total economic output,⁵⁹ and citizens’ rights because of the 3.2 million EU citizens living⁶⁰ and 2.3 million working in the United Kingdom.⁶¹ A third issue, fisheries, is important for various reasons including the extensive impacts of the Common Fisheries Policy (“CFP”) on fishermen’s livelihoods and central role fisheries have played in the Brexit debate so far.

Citizens’ Rights

One of the most significant unresolved issues relating to the Rule of Law is clarity around the future rights and obligations of EU citizens resident in the UK. The policy intention for the regime that will govern those current in the UK has been set out in policy papers including on the citizens’ rights.⁶² These cover the development of a settlement scheme for EU nationals and plans for a future ‘points-based’ arrangement, which are contained in the white paper on skills-based immigration.⁶³ The policy

⁵⁷ Spectator, [Full text: John Bercow’s resignation speech](#), September 2019

⁵⁸ FT, [UK set to delay key laws until after departure](#), February 2019

⁵⁹ House of Commons Library, [Financial Services: contribution to the UK economy](#), July 2019

⁶⁰ European Parliament, [European Parliament resolution on the state of play of the UK’s withdrawal from the European Union](#), September 2019

⁶¹ ONS, [Population of the UK by country of birth and nationality](#), May 2019

⁶² Gov.uk, [Citizens’ Rights - EU citizens in the UK and UK nationals in the EU](#), November 2018

⁶³ Gov.uk, [The UK’s future skills-based immigration system](#), December 2018

commitments contained in this paper have been bolstered by Boris Johnson's "repeat[ing] unequivocally" the guarantee to more than three million EU citizens.⁶⁴

For our interviewees a paramount concern was the impact of this instability on EU staff working in the UK. Businesses were quick to acknowledge the positive impact of the reassuring language coming from government about the status of EU nationals.

"The language to date has been relatively positive, as it is focused on the right to remain."

"We are confident that the soundings are that rights will be guaranteed in the correct way"

However, the lack of legislative certainty due to the failed passage of the Immigration Bill, and rejection of the Withdrawal Agreement, mean none of these promises have yet been enshrined in law. The Government has proposed to pass this law via secondary legislation, but the researchers at the Public Law Project have suggested that this use of Henry VIII powers under s.8 EU(W) Act 2018 "might run into difficulties".⁶⁵ In addition, concerns have been raised by the main political groups in the European Parliament⁶⁶ that the scheme for European nationals is not working, citing figures that suggest 42% of applicants have not been given settled status, but have instead been offered pre-settled status.⁶⁷

This complexity meant that businesses were quick to caveat that soundbites were not enough. They pointed to the anxiety felt by staff about their status post-Brexit as evidence for the importance of legislation in this area. To assuage staff concerns many businesses independently took action to help staff apply for settled status, and to confirm their support regardless of the eventual Brexit outcome. Business also raised the issue of a lack of clear communication and action by government.

"For many EU nationals, particularly those that face individual circumstances which make it difficult for them to secure their residence a lack of information means that even though that application for settled status itself is relatively easy, there is a risk of some becoming overstayers".

One of our interviewees explained how the uncertainty for staff extended beyond citizenship and encompassed concerns about their entitlements, even if they were to obtain settled status following a No Deal Brexit.

"The latent uncertainty - including for example over payments by EU nationals to the NHS over time, may cause further problems".

Some were doubtful about the Home Office's ability to manage the immigration regime after Brexit and were worried about the burden for enforcement could fall on employers. They were concerned that they be left with immigration enforcement responsibilities such as ensuring they were only recruiting individuals with settled status. The recently updated Citizens' Rights policy paper states that in the period following a No Deal exit employers will not need to conduct checks beyond evidence from national identity cards or passports.⁶⁸ However, interviewees indicated that, in practice, business is likely to be cautious and would want to see evidence of an individual's legal status, with consequences for prospective EU / EEA applicants.

⁶⁴ Sky News, [Boris Johnson to enshrine EU citizens' rights in preparation for no-deal](#), July 2019

⁶⁵ The Law Society Gazette, [Brexit bills must be passed in time](#), August 2019

⁶⁶ European Parliament, [European Parliament resolution on the state of play of the UK's withdrawal from the European Union](#), September 2019

⁶⁷ Guardian, [Rise in EU citizens not getting UK settled status causes alarm](#), August 2019

⁶⁸ Gov.uk, [No deal immigration arrangements for EU citizens arriving after Brexit](#), September 2019

“Employers will be concerned, and they won’t be totally sure about whether the policy papers are actually going to be adhered to unless the Government manages to completely reform the immigration system”.

Businesses are already starting to plan for the longer-term impacts on recruitment, particularly in areas where they face acute skills shortages. Most employers envisage that they will still want to recruit from the EU immediately after exit. Therefore, the rights offered to new arrivals granted European Temporary leave to remain will be extremely important. One interviewee told us that the insecurity and lack of guarantees around the European Temporary Leave to Remain would prevent talent from the EU from applying to the UK.⁶⁹

“The three years for those who have been granted temporary leave to remain won’t have a route to settlement - they are in a limbo system until we know more about the final immigration regime”.

Overall, many of the businesses we spoke to conveyed that until the political declarations and policy papers were converted into black-letter law, employees could be left in a vulnerable position. Moreover, some we interviewed expressed scepticism that the UK government could deal with such a complex policy problem at a time when so much else was going on.

“We are concerned that we end up with a similar situation to Windrush. People who arrive in the next few months have absolutely no knowledge of what will happen next, no definite route to settlement and no idea of what their future will hold.”

Issues are also likely to emerge for UK nationals conducting business overseas, owing to the complexity of the UK concluding a set of arrangements with Member States to ensure access for UK staff conducting business on the continent.

“The question will be whether we can agree immigration rules with individual Member States in time to avoid disruption.”

Overall therefore, businesses were left with doubt as to whether the commitments made by government would be honoured, and a complete lack of clarity around the provisions of the future immigration regime. As we get further away from the initial publication of the policy paper on the immigration regime, this lack of clarity has increased. Indeed, government action has served to amplify concerns: the recent u-turn over the proposed use of secondary legislation to stop the free movement of EU citizens the day after Brexit has created added anxiety that government action may cause significant disruption.⁷⁰ Added to this mix is the prospect of an entirely new government, which together presents an increasing possibility that the Immigration Bill that will eventually be presented to Parliament will look nothing like the original policies around which business have structured their internal policies.

Financial Services

The potential for drastic impacts to financial services (FS) providers and the wider economy following a No Deal exit mean that the UK government and European Commission have already put in place many provisions to soften the No Deal landing and prevent major disruptions to business and citizens. The Treasury has laid over 50 FS SIs covering areas as diverse as venture capital regulations, and EEA passporting rights regulations. It should be noted that many of these lay the framework for the domestic FS regime, not just FS exports. With input from the Bank of England (“BoE”), alongside the Prudential Regulation Authority (“PRA”) the amendments to FS legislation under the EU(W) Act 2018 are aimed at

⁶⁹ Personnel Today, [Will immigration costs deter talent after Brexit?](#), March 2019

⁷⁰ Lisa O’Carroll, [U-turn over plan to end freedom of movement on 31 October](#), September 2019,

ensuring all EU legislation is operative on Exit Day. These are accompanied by supervisory statements and statements of policy which the BoE now describe as “final”.⁷¹ The Financial Stability Report concludes that the “biggest risk of disruption in a worst-case disorderly Brexit to financial services used by UK households and businesses have been addressed”.⁷²

Cumulatively these actions have gone a considerable way to clarifying the domestic FS regime that will apply in a No Deal situation, and cover contingency plans which will play an important role in ensuring that, for example, cross-border contracts can continue to be serviced following an abrupt exit, if only for a limited time. This, alongside memorandums of understanding on supervisory co-operation and information exchange are some of the few areas in which the EU and UK have undertaken joint actions to reduce No Deal impact.⁷³

Nevertheless, for many FS companies important questions about the future regulatory framework remain unanswered. The loss of access to the Single Market through the passport making it much more complex and costly to export services to the EEA. The early confirmation that the UK intended to leave the Single Market, and the EU’s refusal to grant equivalence initiated moves by policymakers to find a means by which to align regulatory systems in a way that would maintain market access. The UK’s ambitious aims in this regard were set out in the early Brexit White Paper,⁷⁴ and were fleshed out as an aim to agree ‘equivalence plus’ during the transition in the Political Declaration attached to the Withdrawal Agreement.⁷⁵

However, under a No Deal these would not apply. Therefore the May government tried to get a bill passed: Brexit the *Financial Services (Implementation of Legislation) Bill 2017-19* that would have extended the incorporation of EU financial legislation into UK law and regulatory practice for two years after Exit Day, increasing the chances of the UK securing an agreement on market access during this period. By protecting the City from diverging regulations in the event of a No Deal Brexit, and increase the likelihood of obtaining ‘equivalence’ status for UK financial rules whereby Brussels interpret the UK’s financial rules to be close enough to those of the EU’s to avoid unfair competition or inadequate consumer protection.

Despite the Supreme Court ruling in Miller / Cherry it is highly unlikely that the Government will revisit the Financial Services Bill covering future EU regulation which means that pending EU financial rules will not be ensured after exit, putting equivalence into doubt.⁷⁶ Even though the two years offered by the bill an extremely short period from the perspective of Financial Services companies as many short-term project investments have five years return on investment period, many in the city have been vocal that the failure to pass the bill will have negative impacts on long term involvement in EU financial markets.⁷⁷ Parliament, if it wants to retain alignment after exit, will have to pass new primary legislation as the correcting power under the EU(W) Act 2018 cannot be used to keep alignment; creating Rule of Law uncertainty given current levels of parliamentary impasse.

Some have suggested that divergence may lead to reduced compliance. By doubling the amount of regulation, introducing the risk for conflicts between the different sources of regulation and increasing the quantity of low-quality regulation, the scope for companies to behave arbitrarily will have expanded massively. Another Rule of Law risk is the extension of the powers to regulatory bodies such as the Bank of England; unclear or uncertain regulation increases the scope for regulators to ignore, disapply, or

⁷¹ Bank of England, [The Bank of England’s amendments to financial services legislation under the European Union \(Withdrawal\) Act 2018](#), June 2019

⁷² Bank of England, [Financial Stability Report](#), July 2019

⁷³ CBI, [What comes next? The business analysis of no deal preparations](#), July 2019

⁷⁴ Gov.uk, [The United Kingdom’s exit from and new partnership with the European Union White Paper](#), May 2017

⁷⁵ Gov.uk, [Withdrawal Agreement and Political Declaration](#), November 2018

⁷⁶ R (Miller) v Prime Minister; Cherry & Ors v Advocate General for Scotland [2019] UKSC 41

⁷⁷ Euronews.com, [Bankers say Britain risks being shut out of EU financial market](#), September 2019

interpret the law more broadly than was intended. In addition, legal frameworks that are poorly specified can lead to increased incentives for market participants to game the system.⁷⁸

“There will be little convention underpinning the legal system on the day of departure. For example, the law around uncleared derivatives will be dependent on Member States’ national regimes, and there will be a significant amount of legal wrangling about how this patchwork of regulation will be interpreted. An obvious risk is the emergence of disputes over whether derivatives contracts will have been booked, boosting the incentives for firms to challenge counterparties in court.”

The emergence of complex legal landscapes in the aftermath of Brexit, particularly where regulation is within domestic competence, and therefore 27 Member State regimes come into play, is likely to create significant problems. These range from reducing the predictability of financial institutions reactions to the complex regulatory mix, exacerbating the risk of phenomena emerging that cannot be anticipated or measured in advance.⁷⁹

“We have set up net entities overseas. Obviously we are keeping the dialogue open with home regulators, but transparency is key and we are moving to protect our business.”

For many businesses, the prospects of the UK being able to successfully secure full market access as a third country look thin, even with legislation incorporating EU financial legislation. The EU has been famously guarded about granting equivalence, and is capable of withdrawing it: indeed, Switzerland recently lost its equivalence status.⁸⁰

In the short-term this should not be too severe. The EU and UK have both passed a series of temporary fixes to avoid significant financial disruption, with 12 month- and 18 month-extensions to preserve the functioning of current arrangements. Beyond this, however, the prospect of the end of market access mean that businesses have moved activities overseas to ensure they are not hit by the end of frictionless trade.

“We have set up net entities overseas. Obviously, we are keeping the dialogue open with home regulators, but transparency is key and we are moving to protect our business.”

“We cannot be sure of what will happen with access to clearing houses, securities depositories or over-the-counter derivatives over the long term”

Overall, the lack of certainty around market access has led to relocations to jurisdictions where there is more security about the future regime. For FS businesses, taking this practical action is the only way to safeguard against the risk that the ambitious policy-statements around securing a variant of equivalence ring hollow. The departure of some FS functions overseas creates a sense of disquiet and unease in the sector that may exacerbate overall levels of disruption and certainty.

Fisheries

Fisheries have emerged as one of the priority areas for both the UK and European governments over the course of negotiations and are one of the only areas where the EU stands to lose more than the UK

⁷⁸ European Systemic Risk Board, [Reports of the Advisory Scientific Committee](#), June 2019

⁷⁹ See discussion of Knightian Uncertainty in European Systemic Risk Board, [Reports of the Advisory Scientific Committee](#), June 2019

⁸⁰ Bruegel, [The consequences of Switzerland's lost equivalence status](#), July 2019

owing to the richness of the UK's coastal shelf. Under the current rules set by the Common Fisheries Policy ("CFP") EU fishermen catch some eight-times the amount of fish in UK waters as UK fishermen in EU waters.

If the UK is unable to strike a deal with the EU it will become an independent coastal state immediately. This is similar to the outcome under the Withdrawal Agreement, although unlike the WA does not guarantee a transition period governed by the CFP.

"There will be no automatic access for EU fishermen to fish in UK waters following a No Deal"

The Fisheries Bill, that covers policy objectives relating to aquaculture, fisheries and fishing and access to British fisheries⁸¹ has been described by shadow fisheries minister Luke Pollard as a "day one necessity"; despite this subsequently being corrected by Stephen Barclay. Business is concerned that it is unlikely a full Fisheries Bill will get through before time runs down on a No Deal exit, although there is some confidence that a shortened down version could be agreed more rapidly to avoid chaos on Exit Day.

"We've been assured that there is a legal way through, but we're uncertain about whether the full fisheries bill will get through owing to the Parliamentary arithmetic."

"Legal powers already exist to set quotas and control access to UK waters, but the Bill is needed to amend retained EU fisheries law to, for example, help with the implementation of the landing obligations."

The fall of the Fisheries Bill, like the Agriculture Bill, mean that the Parliamentary time available for full scrutiny is limited, and increase the likelihood that a reduced version of the legislation would be passed in order to plug the gaps. From a business perspective this means that, beyond the initial policy which is not enforceable, there is no guarantee of a legal framework being in place to ease the transition to a new system for fisheries, or indeed agriculture.

In the event of No Deal without a Fisheries Bill it is not clear that the Government will rapidly depart from the CFP, however, in the absence of an alternative we may simply see a continuation of the *status quo*.⁸² Politicians may see an advantage to this as it would preserve political capital, and reduces the practical complexity of striking a post-No Deal FTA with the EU. The UK may however choose to diverge rapidly, but any haste to policy design may fail to engage properly with businesses in the industry.

Consequently, in both situations fishermen face being left with little say in the process and a sub-optimal policy outcome. This exposes one of the biggest Rule of Law risks created by a No Deal Brexit, namely that in order to avoid a lack of legal certainty, legislation is likely to be passed at speed without a significant amount of scrutiny, leading to a lack of proper accountability. These broader themes are explored in more detail in the final chapter.

In addition to the complexity around the Fisheries Bill is the concern among fishing businesses that their interests will be traded as part of the negotiations. Recognising the dependence of many EU fishermen on access to UK waters Macron has described fishing rights in UK waters as a "lever" for negotiations.⁸³

Fishing rights could therefore end up being traded for tariff-free access to EU markets. This will flow through to many others in the fisheries value chain such as supermarkets, catering and restaurant businesses, as well as the employment fisheries create and the related industries and service providers

⁸¹ [Fisheries Bill 2017-19](#)

⁸² UK in Changing Europe, [Fisheries policy post Brexit: multi-level challenges and opportunities](#)

⁸³ BBC, [Analysis: Macron's blunt Brexit warning to UK over fishing](#), November 2018

(tourism, banking, distribution & packaging, shipping and professional services). Value chains are complex and a huge impact on one sector which is significant to the economy, and local coastal economies, is likely to have ripple effects on others. There is a risk that this type of horse-trading violates the commitment to legal equality in conflict resolution, with one group's rights being traded-off in order to secure another's.

Uncertainty about EU and Member State action

In some policy areas, if the UK becomes a third-country the EU will make decisions about whether to grant the UK special status. In financial services, as described above, this would amount to agreeing 'equivalence' around FS regulations. For data, as this paper sets out, whether the EU considers the UK's data protection framework 'adequate' will be crucial for setting out the future business regime.

The transfer of decision-making power to the EU creates an issue for the Rule of Law as it reduces both the certainty of the future regime, which will be reliant on a decision by actors outside the UK and reduce input to the law as UK stakeholders will no longer be able to straightforwardly influence important decisions about the future framework.

Data Flows

In the event of a No Deal the UK would be become a 'third country' from a data perspective. Then arises the question of whether the EU is willing to issue an 'adequacy decision' under Article 45 of the Regulation (EU) 2016/679 stating that the UK offers an adequate level of data protection, and that EU-UK data transfers can take place. It should be noted that it is up to the UK whether personal data can be transferred to other countries from the UK, and the UK government has signalled it will recognise the EU as adequate in a No Deal scenario.⁸⁴ Factors to be taken into account include the Rule of Law, respect for human rights and fundamental freedoms, the existence and effective functioning of independent supervisory authorities, and the international commitments of the third country.⁸⁵

"It seems likely that in a No Deal scenario that an adequacy decision will not be granted, as No Deal is acrimonious. There will be no goodwill to assess the UK's adequacy. But what we don't know is how long it will take for the acrimony to end and what will happen if the UK / EU start talking again given that the UK is already aligned with data protection law".

All of the firms we spoke to with cross-border operations raised the question of whether the UK would be successful in obtaining a data adequacy decision from the EU.

"We are worried about what it would mean for our business if the UK was no longer a safe harbour for data, this has significant implications for our HQ in Switzerland"

This is because for many business data is essential for operations. Those we spoke to were extremely concerned about the potential for disruption to these data flows.

"We need to see clarity around how data flows are going to be managed in a post-Brexit environment. Our marketing, information and HR data will be impacted if we cannot get an adequacy decision"

An additional issue relates to the UK's treatment of data from third countries, especially the US. The UK government is trying to put into place arrangements to ensure UK businesses can still transfer data to the US under the Privacy Shield, but as Privacy Shield is an expressly US – EU arrangement this will

⁸⁴ Patel and Lea, [EU-UK Data Flows, Brexit and No-Deal: Adequacy or Disarray](#), August 2019

⁸⁵ GDPR-info.eu [Art. 45 GDPR Transfers on the basis of an adequacy decision](#)

require that the US business participating in the Privacy Shield update their public commitments to include the UK.

“One of the biggest impacts on business will be membership of the UK – US privacy shield.”

If the UK is unable to get an adequacy decision there are some legal workarounds for businesses, for example using Standard Contractual Clauses (SCCs) or Alternative Transfer Mechanisms (ATMs) to ensure that businesses can continue to receive data legally from the EU / EEA.⁸⁶ however, there has been some question raised by the *Schrems II* case around whether SCCs under which personal data may be transferred to non-EEA countries violate the rights of data subjects.⁸⁷ The ruling in this case is likely to have an important bearing on companies No Deal data workarounds.

“Standard contractual clauses are a template contract which the commission developed, however there is currently a case going the ECJ Schrems II case about whether SCCs are compliant with EU citizens privacy rights. If the court invalidates the use of SCC this could impact the workarounds that businesses are using in case of a No Deal Brexit in the absence of an agreement on data”

For companies there are two major uncertainties, first whether they know there is a problem, and second whether they know they are vulnerable. Firms using cloud servers may not ever be aware that they are dependent on UK-EU data transfers. Some of the business that we have surveyed have already undertaken steps to protect their data using SCCs, but this may be more difficult for less agile, smaller, competitors and suppliers as it involves significant investment to ensure data flows remain lawful.

“We are creating a set of binding corporate rules that will allow us to transfer data seamlessly, that gives us some comfort.”

Even if companies undertake alternative arrangements to preserve seamless data flows, there remains the question, raised in Chapter 1 in the section focused on regulatory divergence of what the future framework regulating data will be. For now, it seems likely that the UK will retain its alignment with the EU in order to obtain an eventual adequacy agreement, but this is far from guaranteed.

However, there is still a question of what the regulatory presence for a company that is UK focused with an external focus. Will there be stringent checks from regulators in the EU. Will the pragmatic approach from the ICO change? Will we face different standards?”

In addition to the concerns raised above, in their paper on EU-UK Data flows the UCL European Institute have raised questions about whether the EU would consider the UK’s current data regime compliant with the Rule of Law and other concerns. Issues that could arise include the UK’s national security and surveillance powers, the Investigatory Powers Act, the lack of fundamental right to data protection, the potential for unprotected onward data transfers, and the incompatibility of the ‘immigration exemption’ in the UK’s Data Protection Act 2018.⁸⁸

If the UK is unable to get a data adequacy decision, this will jeopardise a wide range of business activities, including companies that depend on participation in EU data exchanges, for example for clinical trials and pharmacovigilance, forms of data sharing that ensures patient safety and the rapid

⁸⁶ Gov.uk, [Using personal data in your business or organisation if there’s no Brexit deal](#), February 2019

⁸⁷ Cabinet Office, [Data Debate on the 23rd October in the House of Commons, Table detailing the questions asked and responses](#), January 2019

⁸⁸ Patel and Lea, [EU-UK Data Flows, Brexit and No-Deal: Adequacy or Disarray](#), August 2019

sharing of problems between countries.⁸⁹ The customers and business in the UK would therefore no longer be able to benefit from the shared information about the safety of medicine, leading to a significant threat of counterfeit medicines, and to end users of consuming dangerous medicines.⁹⁰

Regulatory divergence and the trade relations

The example below of REACH regulations provides another exemplification of the problems created by regulatory divergence. Regulatory divergence raises big questions for the Rule of Law including the point raised in Chapter 1 about certainty; and whether companies can have adequate input to the standards regime.

For many that we spoke to, the question of input to the regulatory process and engagement with regulators was a prominent area of discussion. Businesses referred to the existence of a limited number of global regulatory regimes; and where the businesses we spoke to were involved in complex supply chains across EU borders, they spoke of the importance of remaining within the ambit of the EU's regulations.

The main concern was preventing a No Deal departure from creating non-tariff barriers to trade. However, a secondary concern was that if the UK followed the EU's regulatory frameworks in order to minimise barriers to trade, that they would lose the ability to influence the shape of that regulation through UK politicians operating at the EU level. The UK, as a less powerful market than the EU, would likely volunteer to abide by EU standards; either by domestic law under No Deal, or via a treaty obligation through a withdrawal agreement. But in both scenarios it would do this without any representation at EU institutions, agencies or bodies. Consequently, companies would cease to have legitimate input into the laws to which they were subjected.

Registration, Evaluation, Authorisation and Restriction of Chemicals ("REACH") Regulations

Departure from the single market means departure from the EU regulatory system, tariffs and border checks on EU exports, creating disruption for supply chains.⁹¹ Many of those we interviewed identified that departure from the REACH regulations (which govern activities in companies that span from auto manufacturing to life sciences and beyond) as an area that would be particularly damaging. Given that it would lead to new non-tariff barriers, and companies having to balance compliance with REACH and the UK's post No Deal REACH equivalent.

"We have been thinking about the kinds of things that we need to do to be ready for REACH, including asking where our inventory should be."

For industries whose activities are governed by REACH a No Deal outcome imposes a range of different costs through new authorisation and registration compliance.⁹² The development of the UK's own systems for the regulation of chemicals and pharmaceuticals, including the UK's Medicines and Healthcare products Regulatory Agency ("MHRA") taking over functions of the EU regulator the European Medicines Agency ("EMA"), will take time as new systems can only be developed to a certain extent in a particular time, and this will require companies to adapt.

"We do not want to have to deal with different systems, but we might have to. If the Government switch REACH off the impact will be massive for our business."

⁸⁹ Exiting the European Union Committee, [The consequences of "No Deal" for UK business](#), July 2019

⁹⁰ BIA evidence to Parliament, [The consequences of "No Deal" for UK business](#), July 2019

⁹¹ Exiting the European Union Committee, [The consequences of "No Deal" for UK business](#), July 2019

⁹² Chemical Watch, [Brexit: Cefic concern at low level of REACH Registration transfers](#), September 2019

Evidence has been submitted to Parliament that the new system is likely to require dual applications for market authorisation and testing, and licences and will make the UK a less attractive market.⁹³ This divergence is particularly senseless for business, as many business groups, despite initial reservations about the functioning of the REACH regulations now consider it the global industry standard, and businesses have little / no appetite to diverge from its specifications.

“We have engaged a lot of government and European colleagues around REACH, and to try and minimize issues with export control and licenses. This is taking a lot of contingency planning to make sure we have the right systems in place.”

Some businesses have even had to take proactive measures as they foresee instability and want to ensure that products are properly registered and licensed going forward, and to avoid a situation where the findings from UK trials are left unrecognised by the EU.

“We want to make sure enough people are on deck to make sure that registrations are processed properly and effectively.”

While those we interviewed had been on the front foot on planning for the transference of registrations, recent reports suggest that many are not prepared for the requirements under REACH in the case of a No Deal exit. Chemicals Watch has identified areas where smaller industry players may be caught out by registration compliance, such as the requirement that substances imported into the EU be checked by the European Chemicals Agency (ECHA) or that REACH registrations for companies based in the UK would no longer be valid. To show that many businesses remain unprepared in this regard Chemicals Watch cites a recent report from the European Commission that identifies that only 52% of the 7,360 substance registrations in the UK had been transferred to the EU-27/EEA by August 2019.⁹⁴

For companies that import and export substances governed by REACH this creates a complex regulatory landscape that, for many small companies lacking in specialist regulatory teams, are likely to find unclear. In addition, the UK is seeking to find some arrangements to minimise additional licensing and testing requirements, and it remains uncertain whether progress will be made.

⁹³ Exiting the European Union Committee, [Oral evidence: The progress of the UK's negotiations on EU withdrawal, HC 372](#), June 2019

⁹⁴ Chemicals Watch, [Brexit, EU and UK REACH and what it all means in practice](#), September 2019

Chapter 4: The Rule of Law Impacts

Nyasha Weinberg and Daniella Lock

This chapter draws on findings from the previous chapters to consider the impacts on the Rule of Law of the UK government's search for clarity on Exit Day if we leave with No Deal. The scale of the legislative exercise that Parliament continues to face in preparing for such an exit gives rise to tensions between aspects of the Rule of Law with the potential for long lasting effects. As we will see, these include issues with the quality of the law being produced, the disturbance of the delicate balance of the separation of powers in the UK as well as a loss of democratic input in legal areas where the UK plans to be bound by EU rules. Over the long term these issues are likely to undermine business interests by fracturing the foundations of legal certainty and confidence upon which business depends, with wider Rule of Law consequences which we unpack below.

The search for legal certainty on exit-day has undermined legal scrutiny and democratic input.

The UK Government has prioritised securing legal clarity for businesses and others by passing the EU(W) Act 2018 to convert EU law to UK law. Anticipating that moving away from a long-established legal order may jeopardise the certainty of that law, lawmakers have spent the past few years unpicking the UK and EU's legal regimes which have been intertwined for almost fifty years. This has been a huge task: the House of Commons Library estimates that 13.2% of UK primary and secondary legislation enacted between 1993 and 2014 was EU related.⁹⁵

But legal certainty is not guaranteed by this mass conversion as it depends on the development of a stable constitutional and legal framework both internal to the UK and that governs the UK's relationship with the EU. Many major changes to the statute book are necessary to reach this point, and not all of these, as set out in the Chapters above, are Rule of Law compliant. For example, in pursuit of certainty, many legal changes have been made without parliamentary scrutiny. Furthermore, in areas where future alignment with certain elements of EU law has been proposed, Parliamentarians may have even less control over law originating in the EU than they have today. Our interviews showed that even by compromising other characteristics of the Rule of Law, it is not even clear that the Government has achieved certainty.

Thus, although the pursuit of certainty has been motivating Government action, the extent to which the UK Government will secure short-term certainty on Exit Day is open to debate.

The powers granted under the EU(W) Act 2018 to prepare for Exit Day undermine parliamentary scrutiny

Owing to the widespread nature of required changes under the EU(W) Act 2018, and in order to make a No Deal Brexit workable, significant powers were granted for the making of delegated legislation, alongside a new Parliamentary procedure for scrutinising this legislation.⁹⁶ There have long been concerns about the constitutionality of these powers, given the potential impact on the sovereignty of parliament through the restriction of scrutiny.⁹⁷

The process for passing SIs, as is provided for under EU(W) Act 2018, significantly limits levels of scrutiny. S.7 of the EU(W) Act 2018 specifies that a limited number of regulations, such as those which create a criminal offence, are subject to the affirmative procedure. The rest of the legal changes would be laid under a negative procedure unless a Minister decided otherwise.⁹⁸ 'Negative' SIs do not require a

⁹⁵ House of Commons Library, *EU obligations: UK implementing legislation since 1993*, January 2015

⁹⁶ House of Commons Library, *The European Union (Withdrawal) Act 2018: scrutiny of secondary legislation (Schedule 7)*, July 2018

⁹⁷ House of Commons Library, *Legislating for Brexit: the Great Repeal Bill*, November 2016

⁹⁸ House of Commons Library, *The European Union (Withdrawal) Act 2018: scrutiny of secondary legislation (Schedule 7)*, July 2018

debate or vote in either House before becoming law. During the sifting process a 'negative' SI can be recommended to move to the 'affirmative' procedure which does require debate and approval by both Houses of Parliament. However, the Minister retains the power to either accept or reject the recommendation, while making a written statement explaining their grounds for the decision.⁹⁹

While the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee can 'draw to the special attention of the House' particular instruments, in practice this only takes place 'relatively rarely'.¹⁰⁰ When scrutiny does take place it is limited. Debates on SIs subject to the affirmative procedure last on average just 26 minutes, and those subject to the negative procedure are only debated if members 'pray' against them within the 40-day scrutiny period and Ministers grant time for debate.¹⁰¹ Moreover, the resources of the Secondary Legislation Scrutiny Committee, which has been developed as a check on the quality of this legislation, have been stretched by the volume and flow of Brexit-related instruments. This has led to serious peaks and troughs in the amount of legislation the Committee is having to deal with. The Government has proposed to work with departments "with a view to mitigating serious peaks", but it remains possible that the extensive workload for the body might have impacted its effectiveness.¹⁰²

There is a risk that much of the delegated legislation passed lacks effective scrutiny

It is clear that the need for legislative overhaul requires that some law is passed through less stringent processes.¹⁰³ However, the broad scope of delegated powers under EU(W) Act 2018, including Henry VIII powers, have been described as a "toxic mix" by the Hansard Society.¹⁰⁴ The volume and complexity of the statutory instruments have led some to raise alarm bells that the current changes being made exceed the powers granted under s.8 of the EU(W) Act 2018 to deal with deficiencies arising from withdrawal.¹⁰⁵ The legal framework established by EU(W) Act 2018 was only meant to give Parliament 'limited scrutiny capacity' with regard to Brexit SIs, with Ministerial powers to modify under limited circumstances; however some are worried that the changes go beyond modification and extend to making changes to law and governance.¹⁰⁶

This lack of democratic input, in the form of Parliamentary scrutiny, into the law-making process is concerning from a Rule of Law perspective, which, as we will see, has implications for both the quality of law formulated and accountability with regards to the implementation of that law.

The rush of legislation has led to quality issues with the new law created

Not only have the formal procedural requirements for the passage of law become less strict, but a report from the House of Lords Secondary Legislation Scrutiny Committee states that the pressure to prepare Brexit-related legislation appears "to have taken its toll on accuracy" with the consequence that some SIs have fallen "well below the acceptable standard".¹⁰⁷ This view is bolstered by reports from the Secondary Legislation Scrutiny Committee that it has been "disappointed by the approach of some Departments to assessments of the impact of Brexit-related instruments", and concerns that the

⁹⁹ Lords Select Committee, [Sifting of proposed negative instruments under the EU Withdrawal Act](#)

¹⁰⁰ Tucker, *Parliamentary Scrutiny of Delegated Legislation*, 2018

¹⁰¹ IfG, [Parliamentary Monitor: Secondary Legislation](#), 2018

¹⁰² House of Commons Procedure Committee, [Further letter to the Chairman from the Parliamentary Under Secretary of State, Department for Exiting the European Union, concerning the Committee's report on Scrutiny of delegated legislation under the European Union \(Withdrawal\) Act 2018](#), October 2018

¹⁰³ Blackwell, [Will the Great Repeal Bill be another abolish parliament bill](#), Hansard Society, October 2016

¹⁰⁴ Hansard Society, [Taking Back Control for Brexit and Beyond: Delegated Legislation, Parliamentary Scrutiny and the EU \(Withdrawal\) Bill](#), September 2017

¹⁰⁵ *ibid*

¹⁰⁶ UK Constitutional Law Blog, [Eliminating Effective Scrutiny: Prorogation, Brexit and Statutory Instruments](#), September 2019

¹⁰⁷ House of Lords, [Work of the Committee in Session 2017–19: Second Interim Report](#), 11 June 2019

explanatory material accompanying SIs offering insufficient information to help understand the instrument's policy objective and intended implementation.¹⁰⁸

Some of the regulation passed in this manner relates to important regulatory areas such as capital requirements for UK banks, and will apply to the UK both in the event of a No Deal Brexit and a Brexit carried out on agreed terms. The rushed passage of a large amount of complex legislation by emergency teams, designed to cater for multiple forms of Brexits, makes drafting errors highly likely. From a business perspective this is concerning as regulations in areas as fundamental as those regulating banking operations may contain significant errors with significant impacts for business arrangements.

These impacts are diverse and may often be unintended. The passage of low-quality law impacts both the environment in which businesses are regulated and business behaviour. For companies to be expected to obey the law, it must be possible for them to do so. If the law lacks basic formal attributes such that businesses and regulators cannot identify the intended purpose and intended results of the law this will have widespread ramifications.

First, if those responsible for implementing the law find that the low-quality law is producing results inconsistent with their regulatory purpose, they may exercise latitude in their interpretation of the law. This may lead to significant divergences in the precise means by which the law in question is applied. Second, confusion over the law may lead to a change in the levels of compliance. It is also possible that any supervisory body will ignore this lack of compliance recognising that they stem from flaws in the law. This risks undermining a core principle of the Rule of Law namely the requirement that strong rules are effectively and consistently enforced. A third point relates to potential for an uptick in litigation following the increase in regulatory latitude in this context: where uncertainties and complexity exists around the law the potential for conflict grows. This has the potential to lead to significant strain on the courts in the resolution of both meritorious and unmeritorious cases.

Upset of the delicate balance of the separation of powers between Parliament and the Government

Another consequence of the significant amount of largely unscrutinised delegated legislation being hurriedly passed to prepare for No Deal is an upset to the delicate balance of the separation of powers. The separation of powers requires that each branch of state remains within their role assigned by the constitution – namely it is the task of the legislature to make law, the judiciary to interpret the law and the executive to enact the law. It helps to secure the Rule of Law by ensuring that law-making, through being carried out by the legislature, attains a status of democratic legitimacy to justify it being prioritised above all else. It also serves as a means for Parliament to constrain the executive as, in the words of Lady Hale, “the body responsible for the supervision of the executive”.¹⁰⁹ Thus, government power is limited by law, which is created by Parliament.

In a No Deal context, the exercise of broad Henry VIII powers, and hurried rush of delegated legislation as described above, creates a situation whereby the executive is exercising law-making power usually reserved for Parliament. This has led some commentators to suggest that the extensive authority transferred to Ministers to amend the statute book under the EU(W) Act 2018 raises “serious questions about the separation of powers”.¹¹⁰ An upset for of the balance of the separation of powers, which holds that each branch of state sticks to its own particular constitutional function, may negatively impact business in at least four ways. In the first instance, a key risk for business is that it has much less chance for input into the law made on the domestic level which affects it. In the case that the law is being hurriedly passed in the form of secondary legislation, there is less opportunity for business to consult law-makers on the needs of business than is present when primary legislation is passed. A second key

¹⁰⁸ *ibid*

¹⁰⁹ *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland) On appeals from: [2019] EWHC 2381 (QB) and [2019] CSIH 49*

¹¹⁰ Elliott, [1,000 words / The European Union \(Withdrawal\) Act 2018](#), June 2018

risk is that in wielding broad law-making power, the Government overreaches itself in a way that provokes judicial intervention and causes further confusion for businesses. A third risk is the impact for businesses that rely on the reputation of UK law for their operations, and a fourth is that the Parliamentary instability risks inward investment, and the conclusion of trade deals when these could be torpedoed at the last minute.

There is also recent evidence that the UK Government is establishing for itself more power through the reliance on SIs. An example of this is given by Sinclair and Tomlinson who refer to The Capital Requirements (Amendment) (EU Exit) Regulations 2019 which transfers enforcement functions of the financial sector to HM Treasury, the Prudential Regulation Authority, and the Financial Conduct Authority.¹¹¹ The concern here is that decisions are being made about division of powers held by regulators and the executive without full parliamentary scrutiny.

Not only could the passing of SIs in a manner which increases executive power further have long term effects which further undermine the separation of powers, but it also increases the prospect of judicial intervention.¹¹² The UK courts have previously shown willingness to disapply SIs if they are considered to have an effect or be made for a purpose outside the scope of the statutory power pursuant to which they were made.¹¹³ The disapplication of SIs in this way could create further gaps in the UK legal framework on exiting the EU, creating yet more uncertainty which undermines business interests.

The loss of democratic input in legal areas where the UK proposes to continue to be bound to the EU regime.

The overarching message that we heard from business was that it wanted to minimise the level of divergence from the EU's regulatory system. The EU process of harmonisation is the process of creating common standards across the internal market, precluding each Member State from creating its own rules and enabling the free circulation of products.¹¹⁴ Harmonised rules generally cover health, environmental and safety requirements for most sectors; in some areas such as chemicals and automotives harmonisation requires that products are built to a set of technical specifications.

For business harmonisation means a predictable legal framework in each of the Member States, and the near guarantee that if the business follows the rules, that it will be able to sell anywhere in the bloc. Businesses surveyed by the Confederation of British Industry (CBI) concluded that the benefit of harmonisation, and mutual recognition in the case of non-harmonised goods 'vastly outweigh' the costs.¹¹⁵

The Government has already put in place plans to minimise divergence following No Deal, recognising the importance of frictionless trade for business. As described in Chapter 3, the unpassed financial services bill would have the UK tracking EU regulatory standards to minimise disruption in a No Deal scenario. For goods, No Deal means that "free circulation" will cease as the UK leaves the EU system of mutual recognition. However, in recognition of the need to avoid trade frictions created by regulatory divergence, the Government has pledged to follow the EU's regime in some areas, especially those that are highly regulated such as agri-food and chemicals.

The EU has also emphasised that access to its internal market for the UK, via a Free Trade Agreement ("FTA") following a No Deal Brexit will require regulatory alignment. In a 2017 lecture Michel Barnier sets out that a future partnership will be dependent on a 'level playing field': "For the first time ever in

¹¹¹ Sinclair and J. Tomlinson, [Eliminating Effective Scrutiny: Prorogation, No Deal Brexit, and Statutory Instruments \(Part 2\)](#), Sept 2019.

¹¹² Mark Elliott has noted that the risk arises that it will be "relied upon by future governments as precedent for sweeping executive powers...will likely reverberate for a considerable time to come". See M. Elliott, [The Healthcare Bill: A Case Study in the Implications and Dangers of Legislating for Brexit](#) *Public Law for Everyone*, February 2019

¹¹³ See [R \(Public Law Project\) v. Lord Chancellor \[2016\] UKSC 39, \[20\]-\[28\]](#). See also [R \(UNISON\) v Lord Chancellor \[2017\] UKSC 51](#).

¹¹⁴ European Commission, [Free movement in harmonised and non-harmonised sectors](#)

¹¹⁵ FT, [CBI calls for smooth EU rule alignment](#), April 11 2018

trade talks, the challenge will be to limit divergence of rules rather than maximise convergence. There will be no ambitious partnership without common ground in fair competition, state aid, tax dumping, food safety, social and environmental standards.”¹¹⁶ Actions to maintain regulatory alignment help to support business by preserving trade, but as Lawyers for Britain and other groups campaigning for a ‘clean Brexit’ rightly point out, they create a significant Rule of Law problem, namely the risk of the UK becoming a ‘vassal state’. In ending its formal membership of the EU the UK loses its vote on EU laws, and democratic input into internal-market related laws and treaty change.

One essential component of the Rule of Law is the requirement that law-makers should be making law with the consent of the people, having been selected via a “competitive struggle for the people’s vote”.¹¹⁷ Without the UK having representation at the European Parliament and representation through national ministers in the Council no such ‘struggle’ has taken place, and therefore the source of the laws in areas where regulatory alignment is maintained will not be *inter alia* elected representatives from the UK.

Thus, a regime under No Deal that enabled unilateral regulatory compliance without UK input into the rule-making process would amount to a significant challenge to the consent aspect of the Rule of Law. Of course, consent could be gained from an international treaty with the EU, such as the type that might be delivered if the UK were to strike an FTA with the EU, but this would not be as significant as the consent of democratic representation in the EU legislature. Indeed, the UK’s participation in this manner would fail by the standards set by the external body of the Council of Europe, which defines the Rule of Law as meaning the ability of those affected by decisions to be able to contribute to decision making processes, to improve the quality of legislation.¹¹⁸

Once the UK is outside the EU business will have a much harder time advocating for their position in the decision-making process. Those with a European footprint may be able to advocate for their position on the creation of EU laws in Brussels, but this will have less impact than the combined force of business advocating in this manner in Brussels bolstered by the force of British MEPs and UK Ministers operating in the EU. The lack of elected UK representatives making decisions at the European Parliament and Council level means that the scope for participation in decision making has narrowed considerably. UK lawmakers therefore have lost the ability to sculpt their own regulatory regimes and are simply left with the sovereignty to decide that they will track EU legislation.

Thus, unlike during the usual primary legislation process at the UK-level, business will not be able to represent its views during the consultation period. Therefore, for those areas in which UK business seeks regulatory alignment a No Deal Brexit leaves them stuck between a rock and a hard place: they can either lose influence over the rulemaking process or lose market access. It is also worth noting that the pursuit of regulatory alignment simultaneously restricts the possibility of the UK pursuing deals with third countries; which is one of the sources of contestation to the Irish backstop. Thus, even under a No Deal scenario, provided the UK continues with its current policy of ongoing unilateral regulatory alignment, this is likely to prevent the UK from being able to offer regulatory concessions with other countries.

Thus, as No Deal comes with efforts to reduce administrative barriers to trade in the hope of a future trading relationship that fulfills the needs of UK business. From a Rule of Law perspective, it appears that there is a huge risk that an, admittedly imperfect, mode of participation in the EU regulatory order is replaced with compliance to that order without input.

¹¹⁶ Michael Barnier speech at the Centre for European Reform, [The Future of the EU](#), November 2017

¹¹⁷ Schumpeter, 1974; Moller and Skanning, 2013

¹¹⁸ Council of Europe, [State of democracy, human rights and the rule of law](#), 2018

Bibliography

1. Agriculture Bill 2017-19
2. Bank of England, Financial Stability Report, July 2019
3. Bank of England, The Bank of England's amendments to financial services legislation under the European Union (Withdrawal) Act 2018, June 2019
4. Barnard, Where does Brexit leave UK law?, March 2019
5. BBC, Analysis: Macron's blunt Brexit warning to UK over fishing, November 2018
6. BBC, UK judges need clarity after Brexit: Lord Neuberger, August 2017
7. BBC, What laws have been lost after Parliament's suspension, September 2019
8. BIA evidence to Parliament, The consequences of "No Deal" for UK business
9. Bingham Centre, Resolving the Brexit impasse, February 2019
10. Bingham, The Rule of Law, July 2011
11. Blackwell, Will the Great Repeal Bill be another abolish parliament bill, Hasard Society, October 2016
12. Bootmanchem.com, Changes to UK REACH Statutory Instruments, June 2019
13. Bruegel, The consequences of Switzerland's lost equivalence status, July 2019
14. Cabinet Office, Data Debate on the 23rd October in the House of Commons, Table detailing the questions asked and responses, January 2019
15. CBI, What comes next? The business analysis of no deal preparations, July 2019
16. CBI Business Optimism Indicator, quoted in Trading Economics
17. CBI, No-deal Brexit is a tripwire into economic chaos, July 2019
18. Chemical Watch, Brexit: Cefic concern at low level of REACH Registration transfers, September 2019
19. Chemicals Watch, Brexit, EU and UK REACH and what it all means in practice, September 2019
20. Chu, Brexit: Civil servants moved around for no-deal plans as deadline shifts, July 2019
21. Constitution Committee, 'Healthcare International Arrangements) Bill' (18 February 2019) HL Paper 291.
22. Council of Europe, State of democracy, human rights and the rule of law, 2018
23. Dudman, Think Whitehall with help get us through Brexit? Think Again, Guardian, Jan 2019
24. Elliot, 1,000 words / The European Union (Withdrawal) Act 2018, June 2018
25. EU Exit, Long-term economic analysis, November 2018
26. European Commission, Brexit 'no-deal' preparedness: Final Commission call to all EU citizens and businesses to prepare for the UK's withdrawal on 31 October 2019, September 2019
27. European Commission, Brexit Negotiations: What is in the Withdrawal Agreement, November 2018
28. European Commission, Free movement in harmonised and non-harmonised sectors
29. European Commission, Notice to Stakeholders, Withdrawal of the United Kingdom and EU rules in the field of Civil Justice and Private International Law, January 2018
30. European Futures, Amending Retained EU Law after Brexit, October 2018
31. European Union (Withdrawal) (No. 2) Act 2019
32. European Parliament, European Parliament resolution on the state of play of the UK's withdrawal from the European Union, September 2019
33. European Systemic Risk Board, Reports of the Advisory Scientific Committee, June 2019
34. Exiting the European Union Committee, The consequences of "No Deal" for UK business, July 2019
35. Exiting the European Union Committee, Oral evidence: The progress of the UK's negotiations on EU withdrawal, HC 372, June 2019
36. FCA, Preparing for Brexit in financial services: the state of play, 16 September 2019
37. Fisheries Bill 2017-19
38. FT, CBI calls for smooth EU rule alignment, April 11 2018
39. FT, EU warns Johnson plan on rules divergence will hinder trade talks, September 2019
40. FT, Is business right to still fear a no-deal Brexit?, August 2019

41. FT, No Brexit deal, no money?, September 2018
42. FT, UK set to delay key laws until after departure, February 2019
43. GDPR-info.eu Art. 45 GDPR Transfers on the basis of an adequacy decision
44. Gov.uk, Citizens' Rights - EU citizens in the UK and UK nationals in the EU, November 2018
45. Gov.uk, Citizens' Rights - EU citizens in the UK and UK nationals in the EU, November 2018
46. Gov.uk, Explainer for the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, November 2018
47. Gov.uk, Guidance for business and organisations on the Repeal Bill,, July 2017
48. Gov.uk, Temporary tariff regime for no deal Brexit published, March 2019
49. Gov.uk, The UK's future skills-based immigration system, December 2018
50. Gov.uk, The United Kingdom's exit from and new partnership with the European Union White Paper, May 2017
51. Gov.uk, UK Legal Services on the International Stage: underpinning growth and stability, March 2013
52. Gov.uk, Using personal data in your business or organisation if there's no Brexit deal, February 2019
53. Gov.uk, Withdrawal Agreement and Political Declaration, November 2018
54. Guardian, Rise in EU citizens not getting UK settled status causes alarm, August 2019
55. Hansard, Topical Questions, June 2019
56. Hansard Society, Taking Back Control for Brexit and Beyond, September 2017
57. Healthcare (International Arrangements) Bill
58. Hogan Lovells, The latest view: Enforcement of judgments post-Brexit in event of a No Deal scenario, May 2019
59. House of Commons Library, EU obligations: UK implementing legislation since 1993, January 2015
60. House of Commons Library, Financial Services: contribution to the UK economy, July 2019
61. House of Commons Library, Legislating for Brexit: the Great Repeal Bill, November 2016
62. House of Commons Library, The European Union (Withdrawal) Act 2018: scrutiny of secondary legislation (Schedule 7), July 2018
63. House of Commons Library, The Status of Retained EU law, July 2019
64. House of Commons Procedure Committee, Further letter to the Chairman from the Parliamentary Under Secretary of State, Department for Exiting the European Union, concerning the Committee's report on Scrutiny of delegated legislation under the European Union (Withdrawal) Act 2018, October 2018
65. House of Lords, Work of the Committee in Session 2017–19: Second Interim Report, 11 June 2019
66. IfG, Parliamentary Monitor: Secondary Legislation, 2018
67. IfG, Parliamentary progress of legislation introduced to implement Brexit, July 2019
68. IfG, Preparing Brexit; No Deal, July 2019
69. Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017-19
70. Independent, No-deal Brexit will cost £22bn a year to compensate businesses, landmark analysis reveals, July 2019
71. Institute of Directors, Businesses should step-up no deal preparation, June 2019
72. Law Society Gazette, How no-deal will affect UK courts, September 2019
73. Linklaters, Brexit SI Tracker
74. Lisa O'Carroll, U-turn over plan to end freedom of movement on 31 October, September 2019,
75. Locke, Second Treatise of Government, 1690
76. Lord Chief Justice for England and Wales, English law on the world stage, May 2019
77. Lords Select Committee, Sifting of proposed negative instruments under the EU Withdrawal Act
78. M. Elliott, 'The Healthcare Bill: A Case Study in the Implications and Dangers of Legislating for Brexit', Public Law for Everyone (26 February 2019)
79. Centre for European Reform, The Future of the EU, Michael Barnier Speech, November 2017

80. Moller and Skanning, 2013
81. M-RCBG Associate Working Paper No. 77, Making Brexit work for British Business: Key Execution Priorities, Peter Sands, Ed Balls, Sebastian Leape, Nyasha Weinberg, 2017
82. ONS, Population of the UK by country of birth and nationality, May 2019
83. Parliament, Select Committee on the Constitution European Union (Withdrawal) Bill, January 2018
84. Parliament, Trade Bill: Explanatory Notes, November 2017
85. Parliament, Trade Bill: Explanatory notes on Lords amendments, March 2019
86. Patel and Lea, EU-UK Data Flows, Brexit and No-Deal: Adequacy or Disarray, August 2019
87. Personnel Today, Will immigration costs deter talent after Brexit?, March 2019
88. Politico, 5 Brexit bills that fell victim to UK parliament shutdown, Gallardo and Rosca, September 2019
89. R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant), [2017] UKSC 5
90. R (Public Law Project) v. Lord Chancellor [2016] UKSC 39, [20]-[28]. See also R (UNISON) v Lord Chancellor [2017] UKSC 51.
91. R (Miller) v Prime Minister; Cherry & Ors v Advocate General for Scotland [2019] UKSC 41
92. Raz, The Rule of Law and its Virtue, 1979
93. Schumpeter, 1974
94. Sky News, Boris Johnson to enshrine EU citizens' rights in preparation for no-deal, July 2019
95. Spectator, Full text: John Bercow's resignation speech, September 2019
96. The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 and the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019
97. The Law Society Gazette, Brexit bills must be passed in time, August 2019
98. Treaty on the Functioning of the European Union (TFEU) arts 3(1)(e) and 207(1).
99. Tucker, Parliamentary Scrutiny of Delegated Legislation, 2018
100. UK Constitutional Law Association, Blog
101. UK Constitutional Law Blog, Eliminating Effective Scrutiny: Prorogation, Brexit and Statutory Instruments, September 2019
102. UK in Changing Europe, Fisheries policy post Brexit: multi-level challenges and opportunities
103. UKTPO, Brexit and global value chains: 'No-deal' is still costly, July 2019

**BINGHAM
CENTRE FOR
THE
RULE
OF
LAW**

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
F 020 7862 5152
E

www.binghamcentre.biicl.org

The Bingham Centre for the Rule of Law is a constituent part of the British Institute of International and Comparative Law (www.biicl.org).

Registered Charity No. 209425



**British Institute of
International and
Comparative Law**