

The EU-UK Future Relationship and the Rule of Law

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Executive Summary

The EU and the UK have begun negotiating their future relationship. The two sides [disagree](#) over the structure of the agreement(s), the legal form of any commitments to maintain common standards, and dispute resolution. Each of these disagreements highlights the unprecedented nature of these negotiations: this is the first time the EU has negotiated an international agreement with a state after it has withdrawn from the EU through [Article 50 TEU](#).

The condensed timetable for the negotiations, which must be concluded before the end of the transition period on 31 December 2020, means that both the UK and the EU are under political pressure to find legal compromises quickly. The combination of the legal complexity and the political pressure of these negotiations means that there is a risk that Rule of Law values will be overlooked.

The process

[Article 218 of the Treaty on the Functioning of the European Union \(TFEU\)](#) prescribes roles for the EU institutions throughout the negotiations. However, time-pressure, uncertainty over whether the agreement falls under [EU exclusive competence](#) or [shared competences](#) with the Member States, and the unique context of negotiations with a former Member State risk undermining these channels for political and legal scrutiny.

If the proposed agreement falls under shared competences it may require consent at the Member State level in addition to the approval of the Council of the European Union and the European Parliament. It is unclear how the existing timetable could allow for effective scrutiny in the time available. Furthermore, the complexity of the agreement(s) means that a CJEU Opinion on compatibility with the treaties under [Article 218\(11\) TFEU](#) could be needed before it comes into force.

The UK Government has set out a [clear negotiating position](#), but it has not set out in detail the role that Parliament will play in the process. Parliament only has a [limited formal role](#) in the process of negotiating and approving the future relationship agreement(s). In the absence of a formal role, it would be helpful if the Government could outline what it intends to publish with sufficient notice. This would allow committees to plan their roles in the scrutiny process. Parliament can play a vital role in facilitating the accessibility and public scrutiny of the negotiations.

Dispute resolution

The [Council's negotiation mandate](#) envisages ad hoc arbitration to resolve disputes when the parties cannot reach a political solution through the joint governing body established for the agreement(s). The EU position is that there must be a mechanism for the arbitration panel to refer issues concerning the interpretation of EU law to the CJEU. Otherwise there is a risk that the arbitration panel would provide alternative interpretations of EU law undermining its uniformity.

The UK Government, however, rejects such a mechanism due to its desire for [complete domestic autonomy](#) over the creation and application of law. Any compromise must ensure that there is certainty and clarity over the interaction of EU law and any future relationship agreement(s).

Divergence and alignment

The UK Government has rejected the EU's calls for a 'level playing field' for taxation, labour rights, and environmental standards. This divergence agenda engages a number of Rule of Law standards. At present it is unclear to what extent the UK plans to use any right to diverge immediately after the end of transition. The [EU \(Withdrawal\) Act 2018](#) means that the legal default in most areas will be static alignment. Policy decisions to diverge must take place through the primary legislative process subject to proper parliamentary scrutiny.

Avoiding a cliff edge at the end of transition

The conclusion of a new legal relationship between the EU and the UK before 31 December 2020 will require enormous political will and negotiating skill. Despite the time-pressure, it is in the interests of the Rule of Law that compromises are made to secure agreement. As the [European Parliament](#) has warned, if there is no agreement contingency measures and the international framework may be insufficient to prevent severe disruption.

Introduction

On Tuesday 25 February the European Union (EU) published [its negotiating directives](#) for the future relationship following adoption by the Member States in the Council.¹ On Thursday 27 February the UK Government responded by publishing [its own approach](#) to the negotiations.² The negotiation of the future relationship between the UK and the EU raises a number of significant Rule of Law issues.

This report uses the [Venice Commission's Rule of Law checklist](#) to identify and analyse the Rule of Law issues raised by the negotiations on the future relationship between the UK and the EU.³ These negotiations will have far reaching constitutional and legal implications for the UK and the EU. Rule of Law values, particularly legal certainty and the accessibility of the law, should inform the approach of the UK and the EU to both the process and substance of these negotiations.

This report focuses on the procedural and institutional dimensions of the negotiations. However, these issues, in particular in relation to the Court of Justice of the European Union (CJEU), will inform the depth and breadth of the substance of any agreement. It is important to recognise that commitments at the international level can be beneficial for legal certainty. The contrasting positions of the EU and the UK reflect a global shift from relations between states on the basis of binding and predictable legal commitments towards international diplomacy that is more flexible politically yet potentially less legally stable.

There is a real risk that the unprecedented nature of these negotiations, and in particular the condensed timetable, will see Rule of Law values compromised in the name of political expediency. This report aims to set out these concerns in a clear and accessible way so that the Rule of Law dimension to the debate on the future relationship is not overlooked.

The conclusion of a new legal relationship between the EU and the UK before 31 December 2020 will require enormous political will and negotiating skill. Despite the time-pressure, it is in the interests of the Rule of Law that compromises are made to secure agreement.

This report identifies three areas of concern relating to the negotiations that raise significant Rule of Law issues:

- The process (section 1)
- Dispute resolution (section 2)
- Divergence and alignment (section 3)

¹ Council of the European Union, [Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement](#) (25 Feb. 2020).

² HM Government, [The Future Relationship with the EU: The UK's Approach to Negotiations](#) (27 Feb. 2020).

³ Venice Commission of the Council of Europe, [The Rule of Law Checklist](#) (2016).

1. The process

The process of negotiating a treaty should be subject to the same Rule of Law standards as the process of legislating at the domestic level. The provisions of any agreement produced by the future relationship negotiations will have a significant long-term impact on the lives of citizens in the UK and the EU. Both the UK and the EU must ensure that the process of negotiating and approving the future relationship is commensurate to its constitutional significance. In practice, this means that both sides must take steps to facilitate parliamentary and public scrutiny of the negotiations.

The EU has a well-established legal framework for regulating the process of negotiating agreements with third countries. The EU's treaty framework also provides constraints on the substance of its mandate. However, the ability of that framework to facilitate parliamentary and public oversight may be undermined by the unprecedented challenges of negotiating an agreement with a state that has withdrawn from the EU through Article 50 of the Treaty on European Union (TEU). At present it is unclear how the EU's framework on the negotiations will be adapted for these unique negotiations.

The UK has set out a clear negotiating position, but has not fully explained Parliament's role in the process. There is a real risk that the absence of a structured process to facilitate parliamentary engagement with the negotiations will result in a lack of detailed scrutiny of the legal framework before the end of transition.

The EU

The EU's detailed framework for international agreements is designed to facilitate oversight and input from both the European Parliament and Member States through the Council. This framework is entrenched in the EU treaties. This provides a degree of stability and predictability. However, Article 218 of the Treaty on the Functioning of the European Union (TFEU) has never been applied to negotiations with a former Member State.

Article 218 TFEU – The EU's framework for negotiating and concluding international agreements

- The Commission submits draft negotiating recommendations to the Council. It usually acts as the Union negotiator. The negotiators propose the adoption of agreements.
- The Council authorises the opening of negotiations, adopts negotiating directives, and authorises the signing and conclusion of agreements. It may address directives to the negotiator and designate a special consultative committee. The Council acts by qualified majority with exceptions for certain agreements where unanimity is required.
- The European Parliament must be kept immediately and fully informed at all stages of the procedure. For most agreements it must provide consent before the conclusion of an agreement. In an urgent situation, the European Parliament and the Council may agree upon a time-limit for consent.
- The Member States must approve the agreement in accordance with their respective constitutional requirements before it can enter into force.
- A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement is compatible with the EU treaties.

Transparency

The EU has promoted transparency through the Commission's publication of the recommendation for a Council Decision with draft negotiating directives on 2 February. The final version was adopted by the Council on 25 February. This obliges the Commission to negotiate with continuous coordination and permanent dialogue with the Council. The Commission also commits to keeping the European Parliament immediately and fully informed at all stages of the procedure. This occurs through meetings between Commission and European Parliament co-ordination bodies, and statements by the chief negotiator at plenary sessions.

The Article 218 approach was the inspiration for the Article 50 process. Throughout the withdrawal negotiations, the Commission remained in dialogue with the European Parliament's Brexit Steering Group. This dialogue was arguably a product of the European Parliament's veto over the Withdrawal Agreement. The European Parliament input into the process meant that, although there was time-pressure for it to provide consent before the 31 January 2020, it was unlikely that it would reject the Withdrawal Agreement.

Structure

The EU and the UK disagree over the structure of the future relationship. The Council Decision identifies Article 217 TFEU as a legal basis.⁴ This authorises the EU to conclude comprehensive association agreements with third countries. The Council argues that 'the envisaged partnership should form a coherent structure and be embedded in an overall governance framework'.⁵ These features suggests a single international agreement with different chapters covering the various areas of co-operation.

The UK Government, on the other hand, envisages multiple different international agreements. It states that a Comprehensive Free Trade Agreement (CFTA) should be at the core of the future relationship, and that this should be supplemented by a range of other international agreements. Furthermore, the Government argues that 'all these agreements should have their own appropriate and precedented governance arrangements'.⁶ The contrasting positions cause uncertainty over the basics of the legal form of the future relationship. Furthermore, as outlined below, the disagreement leads to ambiguity over the EU's requirements to approve any agreement(s) coming out of the negotiations.

Approval

Time-pressure and the uncertainty over competence could affect the approval of the agreement by the EU institutions. The status quo of application of the EU treaties to the UK ceases on 31 December 2020 when the transition period ends. The cliff-edge of the transition period ending without a new agreement poses problems for foreseeability, stability and certainty of EU-UK relations. Contingency measures and the international framework may not be a 'sufficient legal framework to prevent severe disruption'.⁷ Therefore, the EU institutions are under pressure to fulfil all the necessary requirements before this date. This may affect the quality of the process.

⁴ Council of the European Union, [Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement](#) (25 Feb. 2020).

⁵ Council of the European Union, [Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement](#) (25 Feb. 2020) para 7.

⁶ HM Government, [The Future Relationship with the EU: The UK's Approach to Negotiations](#) (27 Feb. 2020) para 6.

⁷ European Parliament, [Resolution on the proposed mandate for negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland](#) (12 Feb. 2020) para 8.

There is uncertainty over whether the agreement will fall under exclusive EU competence or shared competence with the Member States.⁸ The Commission states that competence can only be determined at the end of negotiations.⁹ If the EU single agreement structure is followed, the subject-matter in the directives suggest shared competences and a mixed agreement. Such an agreement would require the time-intensive approach of approval at the Member State level.

If the approach suggested by the UK Government of using a multiple agreement structure is followed, a core Free Trade Agreement could be concluded that requires only approval by the Council and the European Parliament. An exclusive EU agreement would allow for greater legal clarity and simplicity and a faster approval process before the end of the transition period. However, a mixed agreement would mean increased national input before the conclusion of the agreement.

Finally, the Opinion mechanism is crucial for the Court of Justice of the European Union (CJEU) to ensure that international agreements are compatible with the EU's treaties. A precedent has been set by the Belgian Government's Opinion request on the dispute resolution mechanisms in the Canada Agreement (CETA). This followed the Walloon Parliament's refusal to approve. An agreement with a former Member State is a novel innovation raising several legal unknowns. Previous examples of innovation have resulted in the CJEU intervening. In 2014, the CJEU found the draft accession agreement to the European Convention on Human Rights incompatible with the treaties. In this context any intervention by the CJEU would be politically controversial. However, it is important to recognise that the CJEU's role ensures the legality of international agreements. By examining the agreement in detail the CJEU can, before the agreement comes into force, prevent legal effects that are contrary to EU law.

Implementation

When the EU negotiates an agreement with a third country in 'normal' circumstances the legal situation is unchanged until the agreement comes into force. This allows for phased implementation of agreements. The EU's international agreements normally bring EU law and the domestic law of the other party closer together, whereas in this case the UK will diverge away from EU law when the agreement comes into force. The end of the transition period makes implementation less straightforward.

The Withdrawal Agreement creates a mechanism that would allow one extension of the transition period for either one or two years. The Joint Committee would need to make this decision before 1 July 2020.¹⁰ However, the United Kingdom has legislated to prohibit Government Ministers from agreeing to such an extension.¹¹ It is legally unclear whether there are any other means to extend the application of the treaties so as to enable phased implementation of any future agreement(s). Possible options are amendment in international law of the Withdrawal Agreement before 31 December to continue the transition period notwithstanding Article 132, or a mechanism in a future relationship agreement itself to continue application of the treaties. The Minister for the Cabinet Office, Michael Gove, has stated that he is confident that a Free Trade Agreement and agreement on fisheries will be concluded by 31 December, but negotiations may need to continue on internal security co-operation

⁸ The exclusive EU competences are listed in [TFEU art 3](#). The shared Member State competences are found in [TFEU art 4](#).

⁹ European Commission, [Recommendation for a Council Decision authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland](#) (3 Feb. 2020) p 3.

¹⁰ Official Journal of the European Union, [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#) (12 Nov. 2019) art 132.

¹¹ [European Union \(Withdrawal Agreement\) Act 2020](#), s 33.

beyond this date. Despite this, he has ruled out the possibility of a transition or implementation period for the future relationship.¹²

The UK

In legal terms, the UK has a weaker framework than the EU for parliamentary involvement in treaty-making. The UK's mandate for the future relationship was produced without any formal parliamentary involvement. Parliament's formal legal role in relation to the future relationship is limited to the power under the Constitutional Reform and Governance Act 2010 to delay the approval of the treaty.

Section 20 of CRAG 2010 – The UK's statutory framework for treaty approval

- Parliament is only involved in the approval of treaties after they have been finalised and has no formal role in approving the mandate or supervising the negotiations.
- A treaty cannot be concluded unless 21 days passes without either House of Parliament resolving that the treaty should not be ratified.
- A treaty may still be ratified if a Minister is of the opinion that it should nevertheless be ratified with explanation and 21 days passes without the House of Commons resolving it should still not be ratified.
- Clause 31 of the [first EU \(Withdrawal Agreement\) Bill](#) made approval by the House of Commons of objectives a pre-condition for negotiations, created an obligation to issue reports, and created conditions that the future relationship agreement could only be ratified if approved by the House of Commons.
- EU (Withdrawal Agreement) Act 2020 removed this clause and also held that section 20 of CRAG 2010 did not apply to the Withdrawal Agreement.

Parliament and the Withdrawal Agreement

During the Article 50 negotiations, the UK Parliament's lack of formal involvement in the process, when compared to the European Parliament, led to calls for the UK Government to create a bespoke process for the House of Commons to scrutinise and approve the Withdrawal Agreement and the Political Declaration. This led to the creation of the 'meaningful vote' provisions in section 13 of the European Union (Withdrawal) Act 2018. These provisions served to structure the House of Commons' role in the approval process after the Withdrawal Agreement was finalised in November 2018. Section 13 did not provide for structured scrutiny of the negotiations by the House of Commons.

The political circumstances of 2019 resulted in the European Union (Withdrawal Agreement) Bill being rushed through Parliament before exit day on 31 January 2020, with limited parliamentary scrutiny of its provisions, particularly from parliamentary committees in the House of Commons. The condensed timetable also meant that it was difficult for parliamentary committees to examine the revised version of the Withdrawal Agreement and Political Declaration, which were published in October 2019. The House of Lords European Union Committee and the House of Lords Constitution Committee were

¹² HC Committee on the Future Relationship with the European Union, [Oral evidence: Progress on the negotiations on the UK's Future Relationship with the EU](#), HC 203 (11 Mar. 2020).

able to report on the revised Withdrawal Agreement and the EU (Withdrawal Agreement) Bill respectively, but with little time for those reports to be considered ahead of the relevant parliamentary debates.

One of the lessons from the Article 50 process is that parliamentary scrutiny of an international agreement is made more effective through structured early engagement.¹³ It is difficult to generate effective scrutiny of detailed legal agreements from a standing start. One of the benefits of a requirement for parliamentary approval of the Government's negotiating mandate is that it would facilitate early engagement within Parliament. As the Bingham Centre's report on the EU (Withdrawal Agreement) Bill noted, institutional structures, as well as informal parliamentary practices, often develop around formal legal or procedural powers.¹⁴

Parliament and the future relationship

The House of Lords EU Committee has shown the ability of legal mechanisms to structure political accountability. The House of Lords EU Committee used section 29 of the EU (Withdrawal Agreement) Act 2020 as the basis for a report on the Council Decision authorising the opening of negotiations. Section 29 of the EU (Withdrawal Agreement) Act 2020 enables the House of Lords EU Committee and the House of Commons' European Scrutiny Committee to report on 'EU legislation [that] raises a matter of vital national interest' and to trigger an obligation on the Government to arrange a debate on the legislation in question in the respective House. In their report, the House of Lords EU Committee noted with regret the UK Parliament's lack of opportunity to supervise or approve the UK Government's mandate for the negotiations.¹⁵ It is not yet clear whether the House of Commons European Scrutiny Committee will follow this approach.

Parliamentary scrutiny and supervision of the negotiations on the future relationship can play a vital role in enhancing the transparency of the law-making process, and to ensure that the Government is held to account. In the absence of a bespoke structure designed to facilitate oversight of the Government's prerogative power to conduct negotiations, it will fall on select committees in both Houses to scrutinise the documentation produced by the Government during the negotiations on an ad hoc basis. On 11 March the Minister for the Cabinet Office gave a commitment to the Chair of the Committee on the Future Relationship with the EU to provide a written statement to the House of Commons after every second three-week cycle of negotiations.¹⁶ At present it is unclear whether Parliament will have a formal role in approving the treaty, or to what extent Parliament will be able to scrutinise any primary legislation to implement the future relationship.

2. Dispute resolution

Dispute resolution is a major flashpoint between the EU and the UK in the negotiations on the future relationship. The EU envisages an independent arbitration panel to issue binding decisions when the parties cannot agree on a political solution. The parties disagree, however, on whether these dispute resolution mechanisms should include a role for the CJEU. The disagreement goes beyond dispute

¹³ Raoul Ruparel, [Getting the UK ready for the next phase of Brexit negotiations](#), IFG (Dec. 2019) p 6-7.

¹⁴ The Bingham Centre for the Rule of Law, [written evidence on the effectiveness and influence of the select committee system inquiry: scrutinising Brexit to the Liaison Committee](#) (1 May 2019).

¹⁵ HL European Union Committee, [Report pursuant to section 29 of the European Union \(Withdrawal Agreement\) Act 2020: Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement\(8th Report of Session 2019–21 HL Paper 32\)](#) para 29.

¹⁶ HC Committee on the Future Relationship with the European Union, [Oral evidence: Progress on the negotiations on the UK's Future Relationship with the EU](#), HC 203 (11 Mar. 2020).

resolution in itself, and is a manifestation of the wider disagreement over the content, form, and depth of the future relationship.

The EU's negotiating directives advocate independent arbitration to resolve disputes when the parties cannot agree to a political solution through discussion and consultation.¹⁷ This panel would be ad hoc and constituted by arbitrators chosen by the parties. Although arbitration panels are not standing courts with the power to provide authoritative interpretations of international law, the directives commit to its decisions being binding on the parties. The ultimate objective of arbitration is to resolve disagreements between the parties to ensure legal certainty. There are a number of mechanisms from the Withdrawal Agreement that the negotiators could use as the basis for those to be included in the future relationship (see box below). In its paper on the approach to negotiations the United Kingdom government does not make any specific reference to dedicated dispute resolution mechanisms beyond the general reference to appropriate governance arrangements.

Part Six, Title III Withdrawal Agreement – Dispute resolution

- Article 171(1) WA establishes quantitative conditions for fair division. The Joint Committee proposes 25 persons, ten candidates from EU and UK each, and joint proposal of five people as chairperson.
- Article 171(2) WA establishes qualitative conditions to ensure judicial independence. Candidates' independence must be beyond doubt, they must have specialised knowledge of EU law and public international law, and they cannot be EU institution officials, or members of a Government of the UK or a Member State.
- Article 181 WA provides that members shall not take instructions from any organization or Government and shall comply with the Code of Conduct.
- Article 181(2) WA states members enjoy immunity from legal proceedings in the EU and UK regarding arbitration.
- Annex IX of the Rules of Procedure holds that the UK and EU may jointly decide to remove a member and select a new member.

CJEU jurisdiction

The Council states in the negotiating directives that 'should a dispute raise a question of interpretation of Union law, which may also be indicated by either Party, the arbitration panel should refer the question to the CJEU as the sole arbiter of Union law, for a binding ruling'.¹⁸ There is no corresponding mechanism envisaged whereby references could be made to UK courts when interpretation of UK law is relevant for the resolution of a dispute.

¹⁷ Council of the European Union, [Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement](#) (25 Feb. 2020) paras 158-161.

¹⁸ *ibid* para 160.

The EU and UK positions

The EU's insistence on the jurisdiction of the CJEU over the interpretation of EU law is based on the need to ensure that EU law is applied uniformly. The objective is to 'ensure the autonomy of the Union's decision-making and legal order'.¹⁹ Similarly, the UK's rejection of CJEU jurisdiction is based upon a desire to have complete domestic autonomy in the creation and application of law. The perceived risk is that if the CJEU can determine the meaning of EU law standards contained within the legal text on the future relationship then it would be the de facto authority over the UK's domestic implementing legislation.

The UK Government rejects any role for the CJEU in dispute resolution, even indirectly through a reference mechanism. The UK Government states that there should be 'no role for the Court of Justice'.²⁰ This position goes beyond the dispute resolution mechanisms; the UK Government's approach to what subject-matter is appropriate for the future relationship is informed by whether the CJEU has jurisdiction in that area in EU law.²¹ The UK Government explains this position with the argument that 'being a sovereign nation means that we cannot have courts and institutions which are not accountable to the British people imposing laws on the British people for which they did not vote, and policed in a way to which they do not consent.'²² Michel Barnier, the EU's chief negotiator, has argued that the resistance to any role at all for the CJEU means that the UK Government does not 'wish to permit the European Court of Justice to play its full role in interpreting EU law'.²³

The scope of jurisdiction

There is some legal uncertainty over which situations could in practice trigger the CJEU's interpretative jurisdiction. There are over 20 possible references to EU law in the negotiating directives. Union standards as 'a reference point' for the level-playing field further expands this scope.²⁴ Steve Peers argues that the CJEU would only have jurisdiction where the agreement refers to EU law and provides for dispute settlement.²⁵ However, Kenneth Armstrong raises the possibility that the EU may insist that concepts deriving from international trade norms, such as 'barriers to trade', should be regarded as EU law concepts which require the CJEU's interpretation.²⁶

¹⁹ *ibid* para 10.

²⁰ HM Government, [The Future Relationship with the EU: The UK's Approach to Negotiations](#) (27 Feb. 2020) para 6.

²¹ For example, Minister for the Cabinet Office Michael Gove stated that the UK would not participate in mechanisms approximating the Schengen Information System II or the REACH regulation if they require CJEU jurisdiction. See HC Committee on the Future Relationship with the European Union, [Oral evidence: Progress on the negotiations on the UK's Future Relationship with the EU](#), HC 203 (11 Mar. 2020).

²² *ibid*.

²³ European Commission, [Press conference by Michel Barnier on the EU-UK negotiations](#) (5 Mar. 2020).

²⁴ Council of the European Union, [Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement](#) (25 Feb. 2020) para 94.

²⁵ S. Peers, [Negotiating the future relationship between the UK and the EU: the EU negotiating mandate](#), EU Law Analysis (26 Feb. 2020).

²⁶ K. Armstrong, [It's the autonomy, stupid – can the EU and UK agree the rules of a future relationship?](#), LSE Brexit Blog (10 Feb. 2020).

A possible compromise

If the UK refuses to accept the CJEU reference mechanism, the parties could follow the dicta of Opinion 1/17 and express a clear intention that the arbitration panel has no jurisdiction to interpret EU law.²⁷ This could reassure the CJEU that the agreement respects autonomy and EU legality, and adjudication is limited to EU law as a 'matter of fact'. However, the removal of reference mechanisms could lead to a request for a CJEU Opinion under Article 218(11) on whether dispute resolution in the agreement is compatible with the EU treaties.

The CJEU autonomy case law

- [Opinion 2/13 on ECHR accession](#), para 170: the autonomy of EU law in relation to Member States law and international law requires that interpretation is ensured within the structure and objectives of the EU.
- Opinion 2/13, para 184: any action by the bodies given decision-making powers by an international agreement must not have the effect of binding the EU and its institutions to a particular interpretation of EU law in the exercise of their internal powers.
- Opinion 2/13, para 101: The keystone of the EU judicial system is the preliminary reference procedure to secure uniform interpretation of EU law ensuring its consistency, full effect and autonomy.
- [Opinion 1/17 on CETA](#), para 76: the investor court tribunal will have to confine itself to an examination of EU law as a matter of fact and will not be able to engage in interpretation of points of law.
- Opinion 1/17, para 133: it was in no way the intention of the Parties to confer on the Appellate Tribunal jurisdiction to interpret domestic and EU law.

The Political Declaration recognises that the future relationship must balance the need to ensure the autonomy of EU law and the sovereignty of the United Kingdom.²⁸ Therefore the jurisdiction issue could be resolved through a quid pro quo. The UK Government could argue that it will only accept a reference mechanism to the CJEU to preserve EU autonomy if the EU accepts that alignment through the 'level playing field' would inhibit the UK's own regulatory autonomy. The absence of binding level playing field requirements could ensure the CJEU is not ruling on UK law as there would be no obligation for the UK to dynamically align with EU law in these areas (see section 3 for further discussion of this point).

The CJEU in the UK after transition

Regardless of the outcome of negotiations, the UK will remain bound to CJEU jurisdiction in one respect. Despite the statement by the government that it will 'not agree...for the EU's institutions, including the Court of Justice, to have any jurisdiction in the UK',²⁹ the new Protocol on Northern Ireland confirms that the CJEU shall have jurisdiction over the actions of UK authorities on UK territory when they are required to apply EU customs rules. This jurisdiction could only be terminated if the Northern Irish Assembly does not consent to the Protocol remaining in force 4 years after transition,³⁰

²⁷ [Opinion 1/17 of the Court](#) (30 Apr. 2019) para 133.

²⁸ [Revised Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom](#) (17 Oct. 2019) para 4.

²⁹ HM Government, [The Future Relationship with the EU: The UK's Approach to Negotiations](#) (27 Feb. 2020) para 5.

³⁰ [Revised Protocol on Ireland/Northern Ireland included in the Withdrawal Agreement](#) (17 Oct. 2019) art 18.

or if the future relationship agreement supersedes the Protocol.³¹ The final EU negotiating directives state that ‘the envisaged partnership should ensure that issues arising from Ireland’s unique geographic situation are addressed’.³²

After the end of the transition period, the CJEU’s case law will continue to play an important role in the UK’s legal systems. Section 6(3)(a) of the EU (Withdrawal Act) 2018 requires domestic courts to take into account the case law of the Court of Justice when interpreting retained EU law. This provision is designed to provide a degree of legal continuity. However, this continuity has been somewhat undermined by section 26 of the EU (Withdrawal Agreement) Act 2020, which enables the Government to determine the test whereby lower courts may depart from CJEU precedents when interpreting retained EU law. It is unclear if and how the Government will use this power before the end of the transition period.

3. Divergence and alignment

The UK Government’s commitment to securing the right to diverge after the end of transition raises a number of Rule of Law questions. After the end of the transition period, the UK’s statute book could change significantly.

There is a gap between the Government’s public statements on the desire to secure a right to diverge in the negotiations and the Government’s domestic policy agenda. At present it is unclear to what extent the UK Government will legislate to diverge from EU law immediately after ‘IP completion day’ (as defined by section 39 of the EU (Withdrawal Agreement) Act 2020). In certain areas, such as fisheries, it is clear that the Government does intend to diverge from EU law immediately after ‘IP completion day’. However, even in such areas, the reliance on delegated powers in Brexit Bills, such as the Fisheries Bill, mean that it is not yet clear to what extent the UK will change the relevant ‘retained EU law’. In other policy areas, such as financial services, the Government could decide to maintain alignment with EU law, even in the absence of any commitment to do so in the agreements on the future relationship.

Legislating to prepare for ‘IP completion day’ poses a challenge for the accessibility of the law and legal certainty. Laws converted by the EU (Withdrawal) Act 2018 are being amended by a combination of primary and delegated legislation, which is making it difficult to keep track of what is being proposed. The post-Brexit statute book will contain a number of new categories of domestic law, including ‘retained EU law’ and ‘separation agreement law’. It is likely that the UK’s courts will have to develop interpretative principles to decide how these categories of law will interact. These categories will create new challenges for the legislative process, both in Westminster and in the devolved legislatures. The future relationship could add a further dimension to the post-Brexit legislative framework. It is not yet clear whether the agreement on the future relationship will itself be directly effective, how it will be implemented into domestic law, or whether it will require the creation of a further category of domestic law.

³¹ *ibid* art 13(8).

³² Council of the European Union, [Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement](#) (25 Feb. 2020) para 5.

Divergence and alignment in the negotiations

A core element of the negotiations is focused on the extent to which the UK and the EU wish to legally commit to maintain regulatory alignment after the end of transition. The UK Government has made it clear that it will not agree to 'any obligations for our laws to be aligned with the EU's'.³³ The UK Government looks poised to reject the EU's proposal that the future relationship should contain 'robust commitments to ensure a level playing field'.³⁴ Such a commitment to a 'level playing field' could require the UK to ensure its post-Brexit legislation complies with EU standards in relevant areas. Such a commitment does not necessarily require the UK and the EU to maintain dynamic alignment. Totis Kotsonis, a lawyer from Eversheds Sutherland, has pointed out that such a commitment is not necessarily incompatible with regulatory autonomy. Kotsonis argues that both sides could make a commitment that the 'effect of their respective policies should be equivalent' rather than 'an obligation to maintain the same legislation'.³⁵ The EU and the UK may be able to find a compromise position, but from the UK Government's statements thus far it would appear that securing the right to diverge from EU standards after transition is a core objective.

The Council of the EU's negotiating directives on the Level Playing Field (Title 15)

- Level playing field to ensure open and fair competition requiring common high standards and corresponding high standards over time.
- State aid, competition, state-owned enterprises, social and employment standards, environmental standards, climate change, relevant tax matters and other regulatory measures and practices in these areas.
- Requires adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement, including appropriate remedies.
- Union standards to act as a reference point.

The UK Government's chief EU negotiator, Sir David Frost, set out in a lecture on 17 February that securing the right to legislative divergence, and to be free of EU oversight of UK laws, was 'the whole point' of the Brexit project.³⁶ The lecture also set out a vision of how the UK would use the right to diverge to secure a competitive advantage, not by lowering standards but by setting regulations for new sectors 'quicker' than the EU can. Sir David Frost also emphasised the importance of the ability of the UK to legislate 'in a way that suits our own conditions'.³⁷ The domestic legal implications of the UK's commitment to secure a right to diverge after the end of transition have not yet been fully explored.

³³ European Commission, [Recommendation for a Council Decision authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland](#) (3 Feb. 2020) para 89.

³⁴ HM Government, [The Future Relationship with the EU: The UK's Approach to Negotiations](#) (27 Feb. 2020).

³⁵ Totis Kotsonis, [Squaring the circle: Level playing field provisions and the negotiation of a UK-EU free trade agreement](#), Kluwer Competition Law Blog (3 Mar. 2020).

³⁶ Gov.uk, [David Frost lecture: Reflections on the revolutions in Europe](#) No 10 media blog (17 Feb. 2020).

³⁷ Ibid.

The domestic mechanics of divergence and alignment

If the UK Government secures a future relationship which enables divergence in all areas formerly covered by EU competence, then arguably the domestic legislative process will simply revert to how it operated before the UK became a Member State. However, the UK Government's approach to legislating for Brexit is not designed to bring about a return to the status quo ante. On the contrary, the Government has sought to provide a degree of legal certainty by preserving all of the laws made to give effect to the UK's membership of the EU.

The EU (Withdrawal) Act 2018 and the EU (Withdrawal Agreement) Act 2020 provide that the EU law in force at 'IP completion day', whether through domestic legislation or directly applicable EU legislation, will be converted into domestic law. This provides a vital degree of legal certainty. The default position is therefore that the day after the UK leaves the EU, the UK statute book will be aligned with EU standards. However, at the same time, on 'IP completion day' a significant amount of primary and delegated legislation will take effect which will see UK legislation diverge from EU law.

For example, the Fisheries Bill, currently before Parliament, contains a number of provisions that will create new UK laws on fisheries, which depart from the EU law regime. The Immigration, Nationality and Asylum (EU Exit) Regulations 2019 make substantive changes to retained EU law so that it will operate effectively after the end of the transition period when the UK is no longer subject to EU law. The overall legislative picture is that on 'IP completion day' there will be a significant legislative overhaul, some of which will be designed to maintain continuity, and some of which will be designed to implement new policies in areas where Parliament is no longer bound to maintain alignment with EU law. On 1 January 2021, there will be no simple answer to the question: how has the law changed as a result of the end of the transition period?

One of the distinctive features of legislating for Brexit is the heavy reliance on delegated powers and delegated legislation. The Government has created a series of delegated powers to enable ministers to adapt the statute book for Brexit. Some of these powers are designed to preserve continuity after 'IP completion day' by correcting deficiencies in retained EU law, while others enable policy divergence through delegated legislation. This has given rise to some concerns over the impact of Brexit on the balance between primary and secondary legislation. As a Member State of the EU, a significant amount of EU law was implemented through delegated legislation, notably through the power in section 2(2) of the European Communities Act 1972. From a Rule of Law perspective, one of the benefits of that mechanism was that it represented a well-established and predictable legal process for updating the statute book.³⁸

For the sake of clarity it is worth setting out some examples of the different powers that have been enacted or proposed that are designed to respond to the fact that the EU law will no longer automatically apply after the end of transition:

- Section 8 of the EU (Withdrawal) Act 2018 – a power to correct 'deficiencies' arising from the end of the transition period;
- Clauses 14, 15 and 16 of the Agriculture Bill 2019-20 – powers to modify retained EU law to suit 'our own domestic circumstances';³⁹
- Clause 31 of the Agriculture Bill 2019-20 – a power to enable retained EU law on organic certification to be amended 'to establish regulatory equivalence with the EU';⁴⁰ and

³⁸ We are grateful to Professor Kenneth Armstrong for drawing our attention to this point.

³⁹ Agriculture Bill [Memorandum concerning the Delegated Powers in the Agriculture Bill for the Delegated Powers and Regulatory Reform Committee](#) p 9.

⁴⁰ Agriculture Bill [Memorandum concerning the Delegated Powers in the Agriculture Bill for the Delegated Powers and Regulatory Reform Committee](#) para 281.

- Clause 1 of the Financial Services Bill 2017-19 – a power to implement ‘in flight’ EU financial services legislation in a no deal scenario so that the UK statute book would remain in line with EU law in this area immediately after exit day.⁴¹

These powers illustrate that the Government is using delegated powers in Brexit legislation to enable delegated legislation to be made to maintain alignment and to diverge from EU law after transition. This indicates that after the end of transition, the UK Government could use the combination of the ‘right to diverge’ and the delegated powers granted by Parliament to make relatively quick decisions to either remain aligned or to diverge from EU law on a case-by-case basis. As David Frost’s speech points out, the flexibility of the UK’s legislative process could give the UK some economic and regulatory advantages. However, from a Rule of Law perspective, it would be beneficial for both legal certainty and the accessibility of the law if the purpose of all delegated powers could be clearly stated on the face of the relevant bill. It would also be beneficial if the Government would indicate if it is willing to allow passive divergence in particular areas, or whether it intends to ensure that relevant regulations are updated in line with changes made by the EU after the end of transition.

Using delegated legislation to legislate for Brexit

The Government has already produced over 600 statutory instruments designed to prepare the statute book for Brexit (Brexit SIs) and specifically the end of the transition period. Many of these instruments are due to come into force on ‘IP completion day’. The reliance on delegated legislation to prepare the statute book for Brexit has given rise to concerns over the accessibility of the legislative process. The scale of the delegated legislation required to prepare for both a ‘no deal’ exit and ‘IP completion day’ has made it difficult for Parliament to conduct effective scrutiny. The Secondary Legislation Committee in the House of Lords stated:

Preparations for leaving the European Union have required Parliament to consider, in a short period of time, an extraordinary volume of secondary legislation, much of it complex, lengthy and making provision for the significant consequences of a ‘no deal’ exit from the EU.⁴²

Parliament has a number of expert select committees responsible for scrutinising delegated legislation: the Joint Committee on Statutory Instruments, the House of Commons’ European Statutory Instruments Committee and the House of Lords Secondary Legislation Scrutiny Committee. These committees have reported on a number of difficulties in terms of scrutinising Brexit SIs.⁴³ The Secondary Legislation Scrutiny Committee has drawn attention to the quality of the explanatory material produced to accompany Brexit SIs. For example, the Secondary Legislation Committee reported that the explanatory material on the Draft Kimberley Process Certification Scheme (Amendment) (EU Exit) Regulations 2019 ‘provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation’.⁴⁴

The Secondary Legislation Committee has drawn attention to the length and complexity of Brexit SIs. The Committee’s report on the Draft Product Safety and Metrology etc. (Amendment etc.) (EU Exit)

⁴¹ [Financial Services \(Implementation of Legislation\) Bill Memorandum from HM Treasury to the Delegated Powers and Regulatory Reform Committee.](#)

⁴² Secondary Legislation Scrutiny Committee, [Accessing the scrutiny work of the Committee and information resources relating to secondary legislation](#) (45th Report of Session 2017–19; HL 312) p 1.

⁴³ We are grateful to Alexandra Sinclair from the Public Law Project for drawing our attention to these reports.

⁴⁴ Secondary Legislation Scrutiny Committee (Sub-Committee A) [14th Report of Session 2017–19 Proposed Negative Statutory Instruments under the European Union \(Withdrawal\) Act 2018 Draft Kimberley Process Certification Scheme \(Amendment\) \(EU Exit\) Regulations 2019 Draft Motor Vehicles \(International Circulation\) \(Amendment\) \(EU Exit\) Order 2019 International Driving Permits \(Fees\) \(EU Exit\) Regulations 2019 HL Paper 272](#) p 2.

Regulations 2019 stated that 'the exceptional size and complexity of this instrument make it difficult for the Sub-Committee to scrutinise the instrument to the standard to which the House is accustomed'.⁴⁵ The Committee has also identified significant policy changes within instruments designed to correct 'deficiencies' in retained EU law. For example, the Committee drew attention to the Transmissible Spongiform Encephalopathies and Animal By-Products (Amendment etc.) (EU Exit) Regulations 2018 which proposed to remove a statutory duty to ensure staff had appropriate education and training in relation to mad cow disease.⁴⁶ These reports highlight the challenges for both the transparency and accessibility of the legislative process of having to produce so much legislation to ensure that the statute book operates effectively after 'IP completion day'.

The scale of delegated legislation enacted to prepare for Brexit arguably poses a challenge for the accessibility of the law. Delegated legislation is publicised and accessible online in the same way as primary legislation. However, the complexity and density of the instruments enacted will in practice mean that it is hard to keep track of where changes have been made to retained EU law after 'IP completion day'.

⁴⁵ Secondary Legislation Scrutiny Committee (Sub-Committee B) [17th Report of Session 2017–19 Proposed Negative Statutory Instruments under the European Union \(Withdrawal\) Act 2018 Draft International Accounting Standards and European Public Limited-Liability Company \(Amendment etc.\) \(EU Exit\) Regulations 2019 Draft Mobile Roaming \(EU Exit\) Regulation HL Paper 293](#) para 53.

⁴⁶ Secondary Legislation Scrutiny Committee (Sub-Committee B) [8th Report of Session 2017-19](#) - published 6 December 2018 - HL Paper 244 para 7 ; See also A. Sinclair and J. Tomlinson, '[Brexit Delegated Legislation: Problematic Results](#)', U.K. Const. L. Blog (9th Jan. 2020)

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