The EU-UK Future Relationship and the Rule of Law

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On 9 March 2020 the Bingham Centre hosts the event 'Divergence and alignment: The Rule of Law implications of the future relationship with the EU' . This Comment piece sets out the key themes.

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these negotiations: this is the first time the EU has negotiated an international agreement with a state after it has withdrawn from the EU through Article 50 TEU.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 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 transparency and scrutiny of 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 fully explained the domestic constitutional and legal implications of its approach. 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 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, 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).

Complexity of UK law

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. These decisions should not be left to be made through delegated legislation.

There is also disagreement on whether the continuing domestic implementation of the European Convention on Human Rights should be a condition for police and judicial co-operation. It is ambiguous whether repeal of the Human Rights Act 1998 would be a necessary or sufficient condition for such co-operation to be terminated. The UK's unwillingness to commit means that EU Member States would not have external guarantees of fundamental rights protection to replace the sincere co-operation and mutual trust that underpins internal security co-operation between Member States.

The UK's post-Brexit statute book will feature a number of new categories of domestic law, including 'retained EU law' and 'separation agreement law' . Implementation of the future relationship in domestic law could add another layer of complexity for UK courts to decipher. Clear guidance should be provided to the judiciary to ensure legal stability, certainty, and foreseeability.

Conclusion

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.

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