

Institute for Public Policy Research



BRIEFING

II

NO-DEAL BREXIT

THE IMPLICATIONS FOR LABOUR AND SOCIAL RIGHTS

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October 2019

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This briefing paper was first published in October 2019. © IPPR 2019

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ABOUT THIS PAPER

This report fulfils IPPR's educational objective by publishing research to inform the public on the role of the EU's labour and social policy in the UK and the implications of a no-deal Brexit for labour and social rights.

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ACKNOWLEDGEMENTS

I would like to thank The Legal Education Foundation for supporting this research project, without which this report would not be possible. I am particularly grateful to Swee Leng Harris, whose advice and feedback have been invaluable.

My thanks also go to Alexandra Sinclair, Jack Simson Caird, Tom West, and colleagues from the TUC (including Tim Sharp, Mary Towers, Ali Torabi, Rosa Crawford and Elena Crasta) for generously giving their time to provide detailed comments on earlier drafts of the report.



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Citation

If you are using this document in your own writing, our preferred citation is:

Morris M (2019) *No-deal Brexit: The implications for labour and social rights*, IPPR.

<http://www.ippr.org/research/publications/no-deal-brexit-implications-for-labour-and-social-rights>

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INTRODUCTION

The new prime minister is committed to delivering Brexit without further delay. With the government intent on leaving the EU and the chances of a renegotiation of the withdrawal agreement in flux, the prospect of a 'no-deal' Brexit has become increasingly plausible. This scenario could have significant implications for the future of UK law-making; the UK would no longer be subject to the oversight of the European Commission or the jurisdiction of the Court of Justice of the European Union (CJEU).

One critical area of law which could be affected under a no-deal Brexit is EU-derived labour and social policy. This legislation underpins key elements of the UK's employment and equalities framework. EU-derived labour and social policy is a contentious area because it was one of the original concerns of British Eurosceptics in the 1990s and 2000s. Many leading critics of the EU argued that social policy should be the domain of national governments and claimed that the EU's minimum labour and social requirements were too onerous for member states.

Moreover, as the prospect of a no-deal Brexit nears, there are increasing signs that the government could be intending to depart from the European model on labour and social policy. Sajid Javid, the current chancellor, has announced a "Brexit red tape challenge" to either "improve or remove" EU legislation considered inefficient (Tew 2019). Indeed, in 2018, he reportedly argued in cabinet that the UK should scrap certain EU-derived workers' rights as part of a 'shock and awe' strategy to navigate the uncertain circumstances of a no-deal Brexit (Honeycombe-Foster 2018).

There are also reports that the Johnson government intends to disregard prior UK commitments on maintaining environmental and social standards after Brexit (Fleming et al 2019). In the new prime minister's letter to European Council president Donald Tusk in August, Johnson noted that "although we will remain committed to world-class environmental, product and labour standards, the laws and regulations to deliver them will potentially diverge from those of the EU" (Prime Minister's Office 2019a). The government's new proposals on the backstop are explicitly designed to remove the 'level playing field' provisions which require the UK to maintain current levels of social protection (Prime Minister's Office 2019b). On the face of it, the UK's current EU-derived labour and social policy faces an uncertain future in the event of a no-deal Brexit.

This briefing examines the implications of a no-deal Brexit for labour and social rights in the UK and explores how the legal framework governing these rights may change after a no-deal. The briefing finds that, while on 'day one' of a no-deal Brexit EU-derived labour and social rights will for the most part be maintained in UK law, beyond 'day one' these rights face a far more uncertain future.

1. WHAT IS THE EU'S LABOUR AND SOCIAL POLICY?

One of the driving forces of EU policymaking is to create a 'social Europe'. The EU's treaties outline the role of the EU in defining and developing social policy. The Treaty on European Union sets out the objectives of the EU's social policy, stating that the union shall work towards a "highly competitive social market economy, aiming at full employment and social progress" (Article 3 TEU). It also says that the EU shall "combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child" (ibid). The Treaty on the Functioning of the European Union provides further detail, noting a series of specific social policy objectives such as the promotion of employment, improvements in living and working conditions, proper social protection, dialogue between employers and workers, and tackling social exclusion (Article 151 TFEU).

The Treaty on the Functioning of the European Union also defines how the EU's secondary legislation on social policy may be adopted. In particular, Article 153 TFEU specifies that EU directives may be proposed in a number of areas of labour and social policy, including occupational health and safety, working conditions, social security, the protection of workers upon termination of their employment contract, information and consultation, the representation and collective defence of workers and employers, gender equality at work, and the integration of persons excluded from the labour market. This legislation may only impose minimum requirements on member states; it does not prevent the introduction of more stringent measures. Article 153 also specifies some areas where it cannot be used to bring forward legislation, including pay, freedom of association, and the right to strike.

Most of the EU's secondary legislation on labour and social policy is made up of directives. Directives bind member states to the objectives of the legislation but allow national governments to decide the precise means by which they should be implemented. Directives are transposed into UK law via domestic legislation. This domestic legislation can be either primary legislation (acts of parliament) or secondary legislation (subordinate legislation created by members of the executive – generally ministers – under powers granted by an act of parliament).

The EU's legislation on social policy can be split into 12 main areas of activity. Drawing on a number of sources, we summarise the main areas of legislation below (Barnard 2017, Morris 2018, and European Commission 2016).

1. Working time and holiday pay

This legislation regulates working hours, rest times, and annual leave entitlements. It provides workers the right to:

- a maximum working week of 48 hours (with the right to opt out for individual employees)
- minimum daily and weekly rest periods
- a minimum of four weeks' annual paid leave.

2. Equal treatment and discrimination

This legislation promotes equal treatment between people of different genders, ethnicities and other characteristics. Legislation prohibits:

- discrimination between men and women in employment, including harassment and sexual harassment, and in occupational social security schemes
- discrimination on the basis of racial or ethnic origin in employment, education, social protection, and access to goods and services
- discrimination in employment on the basis of sexual orientation, religion or belief, age and disability.

3. Workplace restructuring

This legislation supports employees whose contracts are altered or terminated due to changes in their workplace. Protections cover:

- employees' contractual entitlements when they are moved to a different employer due to a merger or legal transfer
- payment of outstanding claims in the event of insolvency
- information and consultation rights in the event of collective redundancies.

4. Information and consultation

This legislation improves workers' rights to information and consultation and promotes dialogue between workers and employers. Key rights include:

- the right to information and consultation on the development of an organisation's economic situation and decisions that are likely to lead to major contractual changes
- the right to set up cross-national 'European Works Councils' for transnational organisations to represent workers at an EU level.

5. Occupational health and safety

This legislation sets standards for EU member states' occupational health and safety. The Framework Directive places certain obligations on employers with respect to health and safety, including:

- evaluation of the risks posed to the health and safety of workers
- keeping of records on occupational accidents
- provision of adequate health and safety training.

6. Posted work

This legislation extends employment protections to workers who are temporarily posted by companies in another member state. Posted workers are granted the following rights:

- the right to the same rules of remuneration that apply generally to local workers
- the right to minimum rest periods
- the right to minimum paid annual leave.

7. Atypical work

This legislation ensures that workers who do not have traditional employment contracts with their employers – for instance, those in part-time, fixed-term, or agency work – are guaranteed the same protections as other workers. Protections include:

- part-time workers must be treated as favourably as full-time workers and should not be dismissed for refusing to move to full-time work
- fixed-term workers must be treated as favourably as workers on permanent contracts and successive fixed-term contracts cannot be abused
- temporary agency workers should have access to the same basic conditions of employment as other workers, including pay and working time.

8. Parental rights

This legislation provides protections for pregnant workers and for workers with parental or caring responsibilities. Protections falling under this legislation include:

- a minimum of 14 weeks paid maternity leave
- limitations on pregnant or breastfeeding women being obliged to carry out work that endangers their health
- four months of parental leave after the birth or adoption of a child.

9. Awareness of working conditions

This legislation ensures that workers are aware of key aspects of their employment relationship. Guarantees include:

- that employees have the right to information on essential aspects of the job, including the place of work, the start date, the duration of employment, the notice period, the length of the normal working week, remuneration, and paid leave
- that, under the Directive on Transparent and Predictable Working Conditions (not currently in force in the UK), it also ensures, for unpredictable work patterns, that employees are granted information on the time periods in which they may be expected to work and a minimum notice period before a work assignment takes place.

10. Children and young people

This legislation protects children and young people in the workplace. It includes rules on:

- prohibiting children from working
- prohibiting the employment of young people (under the age of 18) where there are health and safety risks
- limiting working time of young people to eight hours per day and 40 hours per week.

11. Social security coordination

This legislation coordinates social security policy across member states in order to protect the rights of people moving across the EU. It includes rules on:

- the coordination of social security systems for mobile EU citizens, covering areas such as sickness benefits, maternity benefits, old-age pensions, unemployment benefits, and family benefits
- the provision of good quality cross-border healthcare to EU citizens in another member state
- the enforcement of social security coordination through the new European Labour Authority.

12. Social inclusion

This legislation helps disadvantaged groups to access essential goods and services and secures equal treatment for individuals in the area of social protection. Protections include:

- equal treatment for men and women in social security schemes
- equal treatment based on racial or ethnic origin in social protection and access to goods and services
- under the European Accessibility Act (not currently in force in the UK), greater accessibility to goods and services for people with disabilities, including computers, smartphones, ATMs, banking services, e-commerce, and transport services.

Beyond these precise areas of legislation, the EU's legal architecture has an important influence on UK labour and social protections. As an EU member, the UK

is subject to the Court of Justice of the European Union (CJEU), the EU's court. The UK courts are bound by the case law of the CJEU and can refer questions to the CJEU on how to interpret EU law. Where the UK fails to implement or comply with EU law, the European Commission can launch infringement proceedings, which can result in a referral to the CJEU. The CJEU's case law therefore shapes how EU labour and social legislation is interpreted in the UK.

In addition to this, EU law can be used directly by individuals through the principle of direct effect. This principle grants individuals the ability to invoke EU legislation before the national courts. Direct effect applies to treaty provisions and regulations, provided certain conditions are met (including that the provisions are precise, clear and unconditional). For instance, the EU treaty provision on equal pay for work of equal value was found to have direct effect (Eurofound 2017).

With respect to directives – which constitute the majority of EU secondary legislation on labour and social policy – EU law allows for direct effect only where the relevant directive has not been transposed into national law by the implementation deadline. Directives can only have vertical direct effect – ie they can only be used by private individuals in claims against the state, rather than in claims against other private individuals. However, also relevant for directives is the EU principle of 'indirect effect', which states that the domestic courts must interpret national legislation as far as possible to be consistent with EU law.

Finally, following the *Francovich* ruling, EU law is subject to the principle of state liability. This means that, provided certain conditions are met, individuals can receive compensation from a member state where they have suffered losses due to the member state failing to properly implement an EU directive.

The unique architecture of EU law has underpinned the UK's labour and social policy over recent decades. Through the case law of the CJEU and the principles of direct effect, indirect effect and state liability, the EU has helped to clarify and enforce labour and social standards in a number of areas – including on the right to equal pay, indirect sex discrimination, and working time (Ford 2016).

2. WHAT HAPPENS ON ‘DAY ONE’ UNDER A NO DEAL?

The previous section detailed the current role of EU labour and social legislation in the UK. In this section we turn to how this legislation may be affected in the event of a no-deal.

We first look at the immediate effects of a no-deal scenario – ie how labour and social rights would be affected on ‘day one’ after the UK leaves the EU without a withdrawal agreement. In these circumstances, the UK and the EU would not have agreed a transition period. This would mean that the UK would immediately no longer be subject to EU law and would no longer be under the jurisdiction of the CJEU.

As part of the UK’s preparations for Brexit, the UK parliament has enacted the EU Withdrawal Act. This piece of legislation ensures that the European Communities Act (ECA) 1972 will be repealed upon the UK’s exit from the EU. Currently, the ECA provides the means by which EU law is given effect domestically and guarantees that EU law has primacy over UK law. It does this by either ensuring EU law applies directly (eg in the case of treaty provisions and regulations) or by allowing for EU law to be transposed into UK law (eg in the case of directives).

By simply repealing the ECA, the act would on exit day disapply the EU treaties in the UK, as well as directly applicable legislation such as EU regulations. Where EU obligations – largely directives – have been transposed into UK law as subordinate legislation via the ECA, repealing the ECA would nullify this legislation as well. In order to prevent this disruptive outcome, the EU Withdrawal Act converts EU law into UK law, creating a new body of UK legislation known as ‘retained EU law’. For ‘direct’ EU legislation (eg EU regulations), the EU Withdrawal Act incorporates them into domestic law. For ‘EU-derived domestic legislation’ already contained in UK law (eg legislation made under the ECA to implement EU directives), the EU Withdrawal Act ‘saves’ such legislation so that it is retained after the ECA is repealed. Finally, for other relevant rights and obligations (eg directly effective rights contained within the EU treaties), these are also converted into domestic law. This helps to ensure legal certainty after exit day by maintaining the status quo as far as possible through domestic legislation (House of Commons Library 2019).

However, there are a series of practical barriers to simply preserving EU-derived law and converting EU law into UK law. This is because a great deal of EU legislation is closely connected to EU institutions and activities. Simply preserving or converting EU law in a domestic setting therefore risks producing legislation that is incoherent in the context of the UK’s exit from the EU. For this reason, the EU Withdrawal Act provides the government with powers to make changes to this legislation through statutory instruments (the most common form of secondary legislation) in order to correct any deficient elements.

In particular, the government has put forward a number of statutory instruments making amendments to legislation in the field of labour and social policy. This includes statutory instruments that make amendments to employment law, equality law, insolvency law, and health and safety law. For the most part, the

amendments made in these statutory instruments are of a technical nature and involve removing references to EU legislation and institutions where they no longer apply. However, in a few cases relating to transnational matters they envisage more substantial changes. We illustrate some examples below, with the proviso that, given the sheer amount of secondary legislation made under the EU Withdrawal Act, there could be other examples of important changes that have not yet come to public attention.

First, the Employment Rights (Amendment) (EU Exit) Regulations make key changes to the UK's legislation on European Works Councils. As mentioned in the previous section, European Works Councils are bodies representing European employees working in multinational organisations. Given their inherent cross-border nature, the legislation on European Works Councils requires agreement with the EU. A no-deal therefore necessarily involves a change from the status quo. The amendments to the legislation mean that it will no longer be possible for UK-based employees to make requests for their employers to set up new European Works Councils (BEIS 2018). In principle, the legislation seeks to maintain the operation of UK-governed European Works Councils already in existence, but the drafting of the statutory instrument fails to put this into effect (Hopper et al 2019). Moreover, the EU's own technical notice indicates that the UK will fall out of the EU's legal framework of European Works Councils in a no-deal scenario.¹

Second, the Social Security Coordination (Regulation (EC) No 883/2004, EEA Agreement and Swiss Agreement) (Amendment) (EU Exit) Regulations address how the EU's social security coordination rules should be adapted in a no-deal context. The EU's system of social security coordination is inherently transnational: it regulates mobile EU citizens' social security rights across member states. In particular, this system relies on coordination to avoid, for example, the payment of social security contributions in more than one state at a time, as well as cooperation within EU bodies to resolve administrative disputes. In a no-deal scenario this cooperation would not be possible. The statutory instrument makes legal changes to this effect, aiming to preserve continuity as much as possible while recognising the possibility that there could be failures of coordination in a no-deal scenario – resulting, for example, in individuals who work in the UK but reside in another member state being asked to pay social security contributions in both countries. Moreover, this legislation of course only intends to preserve rights in the UK; it does not address problems related to UK citizens' social security entitlements in other member states (DWP 2019).

There are also some areas of EU law that are excluded from the EU Withdrawal Act. In particular, the act does not retain the Charter of Fundamental Rights in UK law. The charter currently has the same status as the EU treaties and contains a number of labour and social rights. While the charter in principle consolidates rights that otherwise exist in EU law, the text of the charter is considered in some cases more detailed and explicit (for example, the inclusion of a general right to non-discrimination). Excluding the charter therefore risks narrowing the scope of the UK's labour and social rights after Brexit (Stewart et al 2019).

Finally, it is important to note that, even where EU labour and social rights have been preserved or converted effectively into UK law, there will nevertheless be important changes to how they are interpreted and enforced. Section 6 of the EU Withdrawal Act ensures that the domestic courts must interpret retained EU law – to the extent

¹ The EU's technical notice to stakeholders notes that the UK will no longer be recognised as a member state and therefore, where the relevant thresholds are not met upon withdrawal, "a European Works Council, even if already established, will no longer be subject to the rights and obligations stemming from the application of Directive 2009/38/EC". The relevant thresholds are that a company must have at least 1,000 employees in the EU/EEA with at least 150 employees in each of two member states. Where thresholds are still met, and where the European Work Council's central management or 'representative agent' is based in the UK, they will be transferred to an EU member state (European Commission 2019).

that it is unmodified – in accordance with the case law of the CJEU, as it existed before exit day.² However, the courts are not bound by CJEU case law made after exit day and can no longer use the preliminary reference procedure to clarify the interpretation of EU law. Similarly, section 5 of the EU Withdrawal Act maintains the primacy of retained EU law over domestic legislation passed or made before exit day, but ends the principle of primacy with respect to laws passed or made after exit day. The EU Withdrawal Act also excludes the principle of state liability – ie the right to claim *Francovich* damages – from retained EU law, thereby removing one of the key routes for enforcing EU labour and social legislation (House of Commons Library 2019). Retained EU law may aim to replicate EU law, but without recourse to the same interpretation and enforcement mechanisms of the EU institutions, it will be placed on a less secure footing.

2 Though there is scope for the UK's highest courts to depart from this case law.

3.

WHAT HAPPENS AFTER ‘DAY ONE’ UNDER A NO DEAL?

As explained in the previous section, due to the passage of the EU Withdrawal Act, the UK will for the most part preserve EU-derived labour and social legislation in the immediate aftermath of a no-deal Brexit. But this of course by no means guarantees that labour and social rights will be maintained beyond ‘day one’ of no deal. With no formal relationship with the EU, the UK will no longer be prevented by the EU institutions from changing retained EU law. There is therefore considerable scope for the UK to amend or remove retained EU labour and social legislation in a no-deal scenario.

In this section we explore the potential implications of a no-deal over the medium-to-long term. We focus on both the domestic law and international law perspectives of a no-deal scenario – on the one hand exploring how EU-derived labour and social legislation could be amended domestically, and on the other hand outlining how different international pressures and constraints could influence the UK’s legislative direction on labour and social rights.

3.1. THE DOMESTIC PERSPECTIVE

As explained earlier in this briefing, the UK’s labour and social policies are in many cases currently underpinned by EU law. Under a no-deal exit, the UK would no longer be required under EU law to maintain this legislation. While the EU Withdrawal Act would for the most part preserve EU-derived labour and social policy in the form of retained EU law, the UK would have the scope to subsequently amend or repeal this legislation once outside of the EU institutions.

In order to change retained EU labour and social law, the UK government would need to introduce new legislation. The vast majority of EU labour and social law comes in the form of directives, and so most retained EU law is categorised as EU-derived domestic legislation. This legislation can be divided into two categories: secondary legislation that was originally made under section 2(2) of the European Communities Act 1972 and legislation which was designed to fulfil EU rights or obligations (or is otherwise related to the EU or EEA) but was passed or made through different means. The latter group can include both primary and secondary legislation (House of Commons Library 2019). Table 3.1 outlines how examples of EU-derived labour and social legislation fall into these different categories.³

³ Note that there are some examples of secondary legislation that are made under both the ECA and other acts of parliament (eg The Transfer of Undertakings (Protection of Employment) Regulations 2006) – in this case they straddle the first and second category.

TABLE 3.1**Examples of EU-derived labour and social legislation**

Legislation made under section 2(2) of the ECA	Other secondary legislation	Primary legislation
Working Time Regulations 1998	Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 [made under the Employment Relations Act 1999]	Employment Rights Act 1996
The Civil Aviation (Working Time) Regulations 2004		Equality Act 2010
Road Transport (Working Time) Regulations 2005	Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 [made under the Employment Act 2002]	
Transnational Information and Consultation of Employees Regulations 1999	Information and Consultation of Employees Regulations 2004 [made under the Employment Relations Act 2004]	

Source: Author's analysis

Once the UK leaves the EU without a deal, how could this legislation be amended or weakened? One way forward would be primary legislation. However, this would require passing a bill through the House of Commons and the House of Lords. It might be difficult for a bill proposing reductions in labour and social protections to secure a parliamentary majority, particularly in the context of a hung parliament.

An alternative option would be for the government to change EU-derived domestic law by using secondary legislation. As noted above, the EU Withdrawal Act contains wide-ranging powers to modify EU-derived domestic legislation via statutory instruments. In particular, the EU Withdrawal Act provides for so-called 'Henry VIII' powers, which allow for ministers to make changes to both primary and secondary legislation through statutory instruments.

Statutory instruments involve significantly less parliamentary scrutiny than primary legislation. They are most commonly laid in parliament using the 'negative procedure'. This means they automatically become law on a set date unless they are annulled by either the House of Commons or the House of Lords within 40 days of being laid. It is unusual for either house to annul negative statutory instruments – the last time the House of Commons annulled a negative statutory instrument was in 1979. The routes for parliament to impede or block statutory instruments are therefore relatively limited.

The government could seek to amend EU-derived labour and social legislation through statutory instruments under the EU Withdrawal Act. But these statutory instruments are only meant to be used to correct deficiencies in retained EU law; they are not meant to introduce wholesale policy change. It is therefore unlikely that the government would be able to make substantive changes to EU-derived legislation through this route – and if the government made efforts to do so regardless, there would likely be grounds for judicial review. Moreover, the powers to correct deficiencies in retained EU law under the EU Withdrawal Act are subject to a 'sunset' clause of two years following the date of Brexit.⁴

⁴ Furthermore, the EU Withdrawal Act contains a provision requiring the affirmative procedure for certain statutory instruments intended to amend or revoke any subordinate legislation made under ECA section 2(2). This allows for greater parliamentary scrutiny than the negative procedure.

In some cases, however, it could be possible to amend EU-derived labour and social legislation via statutory instruments made under other acts of parliament. The middle column of table 3.1 lists examples of EU-derived secondary legislation not made under the European Communities Act. This legislation is therefore amendable via secondary legislation made under the relevant parent act.

For instance, the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 could be amended by secondary legislation under the Employment Act 2002. This act gives the government powers to make secondary legislation for securing the equal treatment of fixed-term employees, providing scope for ministers to define in which circumstances equal treatment should be upheld.⁵ Similar mechanisms exist for the government to amend legislation on the treatment of part-time workers under the Employment Relations Act 1999. Under a no-deal, there is therefore scope for the government to introduce statutory instruments to potentially weaken legislation protecting the rights of both fixed-term and part-time workers.

On the basis of this analysis, we can rank the three types of EU-derived labour and social legislation according to their risk of being amended. First, primary legislation such as the Equality Act is the most protected from amendments, given it generally requires primary legislation to be changed (unless Henry VIII powers are used). Second, secondary legislation made under the ECA is the next category of law that is most protected, given there are limited options for amending this legislation once the parent act is repealed (and also given there are additional scrutiny measures in place for amending this legislation). Finally, the category most at risk is secondary legislation made under acts of parliament other than the ECA, because there is greater scope for amending this legislation via the relevant parent act (and the additional scrutiny measures included within the EU Withdrawal Act do not apply).

Once EU-derived labour and social legislation is amended, there is little to stop standards from being lowered. EU membership and the ECA require the UK courts to interpret domestic legislation as far as possible to be consistent with EU law and to disapply incompatible legislation. But under the EU Withdrawal Act and in a no deal scenario, the primacy of EU law will no longer apply with respect to UK legislation made after Brexit. Moreover, while the EU Withdrawal Act requires the courts to follow pre-exit day CJEU case law when interpreting retained EU law, this only applies to the extent that this law is unmodified; once the law is changed, this gives greater scope for the courts to interpret the law differently. A no-deal scenario therefore offers a clear route for the UK government to amend and weaken EU-derived labour and social protections.

Finally, it is also important to note that, even if the government does not actively seek to weaken labour and social standards, there is likely to be divergence with EU law over time as the UK fails to keep pace with the EU. Indeed, the EU has recently introduced a number of new pieces of legislation in the field of labour and social protection, including the Work-Life Balance Directive and the Directive on Transparent and Predictable Working Conditions. These directives were adopted in June 2019 and there is a three-year window for member states to implement them. Assuming the government chooses not to implement parallel legislation, a no-deal

5 The Employment Act 2002 states that the secretary of state can make statutory instruments “for the purpose of securing that employees in fixed-term employment are treated, for such purposes and to such extent as the regulations may specify, no less favourably than employees in permanent employment”. It states that the regulations may specify the “classes of employees who are to be taken to be, or not to be, in fixed-term employment” and the “circumstances in which employees in fixed-term employment are to be taken to be, or not to be, treated less favourably than employees in permanent employment”. It also states that the regulations may “provide for specified obligations not to apply in specified circumstances” (Employment Act 2002).

exit in late 2019 is likely to result in UK labour and social standards failing to keep pace with these new EU directives.⁶

3.2. THE INTERNATIONAL PERSPECTIVE

Alongside the domestic process for changing EU-derived legislation, there are also important international considerations that may shape the UK government's agenda on labour and social rights in the aftermath of a no-deal Brexit.

Pressures

On the one hand, the UK could face pressures to lower standards in order to compete with other countries for trade and investment. Outside the EU's single market and customs union, the UK government may decide to diverge from the European social model and shift towards a lower-tax, less-regulated economy.

If the UK were to pivot away from the EU and seek to strike trade deals with third countries, this could also put at risk the UK's labour and social standards. Certain provisions in modern free trade agreements (FTAs) have raised concerns about the implications for upholding domestic regulatory standards. This is often because modern FTAs tend to extend beyond simply moving tariffs on trade, including provisions on areas ranging from investment to regulatory cooperation. Most notably, modern FTAs tend to include investor-state dispute settlement (ISDS) mechanisms, which are arbitration procedures designed to resolve disputes between foreign investors and host governments. In particular, ISDS allows for foreign investors to sue host governments over alleged discriminatory practices. This has led to cases where private corporations have used ISDS to bring claims against governments due to changes in a host state's labour and social legislation (eg improvements in the minimum wage). Critics have highlighted that the ISDS arbitration procedures lack transparency and could lead to 'regulatory chill' as a result of government fears over costly lawsuits.

Constraints

Alongside considering these international pressures for deregulation, it is also worthwhile to explore whether there are any relevant international constraints on domestic efforts to lower standards. In this section we consider a number of different options.

The most important international constraint on any UK effort to lower standards comes from the EU itself. It is likely that at some point after 'day one' of a no-deal the UK and the EU will want to reengage and pursue negotiations over a new economic relationship. If this is the case, then as part of this agreement the EU will expect the UK to sign up to certain 'level playing field' provisions. These provisions are designed to ensure that neither party has an unfair competitive advantage over the other. Given the closely integrated relationship between the UK and EU economies, the EU is particularly concerned that a future economic relationship could allow businesses in the UK to gain a competitive advantage over their counterparts in the EU. The EU has identified the key policy areas of concern from a level playing field perspective: state aid and competition policy, taxation, and social and environmental legislation (European Commission 2018a).

The precise conditions of any 'level playing field' between the UK and the EU would be the subject of negotiations. However, it is clear that provisions on labour and social standards would comprise a key part of the level playing field. This is because such provisions formed an important component of the customs union contained within the Protocol on Ireland and Northern Ireland (the 'backstop')

⁶ While former prime minister Theresa May put forward proposals for parliament to have an ongoing role in considering how the UK should respond to future changes in EU law designed to strengthen workers' rights, the new prime minister appears to have dropped this commitment (BEIS 2019).

negotiated by Theresa May's administration. In order to ensure the UK did not gain a competitive advantage over the EU through the customs union in the backstop, the EU insisted on a level playing field, including a relatively strict non-regression clause for labour and social standards. The non-regression clause required the UK and the EU to maintain at least the same level of protection provided by common UK and EU standards at the end of the transition period with respect to labour and social protections (European Commission 2018b). It is expected that the EU would require similar provisions for any agreement that eliminated tariffs and quantitative restrictions on all goods traded between the UK and the EU. Indeed, the closer the relationship between the UK and the EU, the more demanding the level playing field provisions.

Some proponents of a no-deal have argued that any future relationship after Brexit between the UK and the EU would constitute only a minimalist economic partnership, akin to the type of relationship negotiated between the EU and Canada (the Comprehensive Economic and Trade Agreement or CETA). Yet even CETA includes certain provisions on labour and environmental policy, including a non-regression clause for labour standards – as do other FTAs negotiated between the EU and third countries in recent years, such as the EU-Japan Economic Partnership Agreement and the EU-South Korea FTA (Morris 2018). Often these provisions are weakly enforced and offer limited protections in practice. But given the specific concerns held by the EU about the UK and its close economic relationship with member states, it is likely that the EU will require more stringent provisions than it does with other third countries.

It is therefore in the interest of the UK to maintain its labour and social standards in a no-deal scenario in order to facilitate a future FTA with the EU. In particular, flagrant examples of deregulation could harden the EU's approach in future negotiations. While this will not impose any formal limitations on the UK's ability to lower labour and social standards, it may well serve as a strong political incentive to maintain the current level of protections.

However, beyond any potential constraints imposed through the UK's future relationship with the EU, there are few international avenues for protecting current labour and social standards in a no-deal scenario. The UK does follow certain international labour standards – notably the eight fundamental International Labour Organisation (ILO) conventions, which protect the four core labour standards, including freedom from forced labour, freedom from child labour, freedom from discrimination at work, and freedom of association and the right to collective bargaining. But these are very weakly enforced and still give considerable scope for the UK to lower its current levels of labour protections.

Similarly, if the UK were to pursue free trade deals with other countries outside the EU in a no-deal context, these deals might include their own provisions on labour standards – for instance, the US negotiating objectives for a prospective trade deal with the UK includes a requirement that the UK must not “waive or derogate” from core labour laws in a way that impacts trade or investment between the two countries (USTR 2019). But these non-regression provisions are enforced on a state-to-state basis, and given the US currently has lower labour standards than the UK it is unlikely to vigorously pursue breaches of a non-regression clause.

Finally, the EU's unilateral ‘basic connectivity’ measures for managing a no-deal scenario – designed to maintain air and road transport between the UK and the EU without major disruption – are attached to conditions on fair competition, including provisions designed to remedy the situation where the UK applies labour standards that are inferior to EU standards (European Parliament and Council 2019a and 2019b). But penalties will only apply when lower levels of protection result in competition in the relevant transport sectors becoming “appreciably less

favourable” in the EU than in the UK. In practice these provisions are therefore likely to only be relevant for the most egregious examples of deregulation.

This section illustrates that, from an international perspective, there are few material constraints on the government’s ability to lower labour and social standards in the event of a no-deal Brexit. Indeed, perhaps the most significant constraint is the willingness of the UK to return to the negotiating table and secure a new deal with the EU after all.

4.

CONCLUSION

This briefing has explored the implications of a no-deal Brexit for the UK's labour and social standards. We have outlined how for the most part labour and social standards will remain intact on 'day one' of Brexit – though for certain areas of legislation, such as European Works Councils and social security coordination, there are notable risks.

Beyond 'day one', the UK will have greater scope to repeal or weaken current labour and social standards derived from EU law. Given the broad range of labour and social legislation currently underpinned by EU law – from laws on equal treatment and parental rights to occupational health and safety and working time – no-deal poses a serious risk to the current level of labour and social protection in the UK. There is a particular risk for retained EU law made under acts of parliament other than the European Communities Act (eg legislation providing rights for part-time and fixed-term workers), which could be more susceptible to changes via statutory instruments.

There will also be certain constraints on government action to lower labour and social standards in a no-deal Brexit scenario. Domestically, it will be challenging to weaken standards through primary legislation with a hung parliament. Internationally, the UK's efforts to strike trade deals with the EU may discourage radical and flagrant efforts to lower standards.

However, deregulation can take a variety of forms. The greatest risk for labour and social protections after a no-deal Brexit is not a brazen attempt to repeal a flagship piece of retained EU law, such as the Working Time Regulations. Instead, it is that the government subtly loosens current protections via secondary legislation, resulting in the UK's legislative framework on labour and social rights drifting apart from the EU model and weakening gradually over time.

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ANNEX

Main examples of EU legislation in the field of labour and social policy include the following (Barnard 2017).

Working time and holiday pay

- Working Time Directive (2003/88/EC)
- Directive on Working Time of Mobile Workers in Civil Aviation (2000/79/EC)
- Directive on Working Conditions of Mobile Workers in Cross-Border Rail Services (2005/47/EC)
- Directive on Working Time in Mobile Road Transport Activities (2002/15/EC)
- Driving Times and Rest Periods Regulation (No. 561/2006)

Equal treatment and discrimination

- Employment Equality Directive (2000/78/EC)
- Racial Equality Directive (2000/43/EC)
- Gender Recast Directive (2006/54/EC)
- Directive on Equal Treatment between Men and Women in Self-Employment (2010/41/EU)
- Directive on Equal Treatment between Men and Women in Social Security (79/7/EEC)

Workplace restructuring

- Insolvency Directive (2008/94/EC)
- Collective Redundancies Directive (98/59/EC)
- Transfer of Undertakings Directive (2001/23/EC)

Information and consultation

- General Information and Consultation Directive (2002/14/EC)
- European Works Council Directive (2009/38/EC)
- Employee Involvement Directive (2001/86/EC)
- Directive on Worker Involvement in a European Cooperative Society (2003/72/EC)
- Cross-Border Mergers Directive (2005/56/EC)

Occupational health and safety

- Occupational Safety and Health (OSH) Framework Directive (89/391/EEC)
- Directive on Minimum Safety and Health Requirements for the Workplace (89/654/EEC)
- Directive on Use of Personal Protective Equipment (89/656/EEC)
- Directive on Display Screen Equipment (90/270/EEC)
- Directive on Manual Handling of Loads (90/269/EEC)
- Directive on Temporary or Mobile Construction Sites (92/57/EEC)
- Directive on the Mineral-Extracting Industries through Drilling (92/91/EEC)
- Directive on Safety and/or Health Signs (92/58/EEC)
- Directive on Medical Treatment on Board Vessels (92/29/EEC)

- Directive on Surface and Underground Mineral-Extracting Industries (92/104/EEC)
- Directive on Use of Work Equipment (2009/104/EC)
- Directive on Prevention from Sharp Injuries in the Hospital and Healthcare Sector (2010/32/EU)
- Directive on Risks Arising from Explosive Atmospheres (99/92/EC)
- Directive on Risks Arising from Biological Agents (2000/54/EC)
- Directive on Risks Arising from Mechanical Vibration (2002/44/EC)
- Directive on Risks Arising from Noise (2003/10/EC)
- Directive on Risks Arising from Carcinogens or Mutagens (2004/37/EC)
- Directive on Risks Arising from Artificial Optical Radiation (2006/25/EC)
- Directive on Risks Arising from Asbestos (2009/148/EC)
- Directive on Risks Arising from Electromagnetic Fields (2013/35/EU)

Posted work

- Posting of Workers Directive (96/71/EC)
- Posting of Workers Enforcement Directive (2014/67/EU)

Atypical work

- Part-Time Work Directive (97/81/EC)
- Fixed-Term Work Directive (99/70/EC)
- Temporary Agency Work Directive (2008/104/EC)
- Directive on Safety and Health in Fixed-Term and Temporary Employment (91/383/EEC)

Parental rights

- Pregnant Workers (Maternity Leave) Directive (92/85/EEC)
- Work-Life Balance Directive (2019/1158/EU) [just in force – revision of the Parental Leave Directive (2010/18/EU)]

Awareness of working conditions

- Directive on Transparent and Predictable Working Conditions (2019/1152/EU) [just in force – replacement of the Written Statement Directive (91/533/EEC)]

Children and young people

- Young People at Work Directive (94/33/EC)

Social security coordination

- Regulation on the Coordination of Social Security Systems (No. 883/2004)
- Directive on Patients' Rights in Cross-Border Healthcare (2011/24/EU)
- European Labour Authority Regulation (No. 2019/1149) [just in force]

Social inclusion

- Directive on Payment Accounts (2014/92/EU)
- European Accessibility Act (2019/882/EU) [just in force]
- Racial Equality Directive (2000/43/EC)
- Directive on Equal Treatment between Men and Women in Social Security (79/7/EEC)



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