



## TECHNICAL NOTE: IMPLEMENTING THE WITHDRAWAL AGREEMENT

1. It is common ground that once the UK leaves the EU, it will no longer be subject to EU law. The Withdrawal Agreement between the UK and the EU will be an international agreement binding both parties as a matter of public international law. This has consequences for both parties, in accordance with the normal principles of their internal legal orders.
2. The Commission has suggested in its position papers that certain provisions in the Withdrawal Agreement, in particular those concerning citizens' rights, should be directly enforceable in the law of the United Kingdom and have the same legal effect as EU law does now.
3. It would be both inappropriate and unnecessary for the agreement to require the UK to bring the EU concept of direct effect into its domestic law. The same substantive result can be achieved if the Withdrawal Agreement requires the UK to give citizens specified rights, and the UK enacts domestic legislation whose effect is to bestow those rights. Not only will EU citizens be able to enforce those rights through the UK's domestic legal system, but the UK's compliance with its international obligations can also be enforced using whatever mechanisms the agreement includes for the resolution of disputes.<sup>1</sup>

### ***Implementation of treaties in monist and dualist systems***

4. As far as the EU is concerned, the agreement will be adopted under Article 50 TEU and will form part of EU law under Article 216(2) TFEU, like any other international agreement to which the EU is a party. It will potentially have direct effect in the legal systems of the Member States, to the extent that its provisions are sufficiently clear, precise and unconditional.<sup>2</sup> This means that the agreement will, by virtue of EU law, automatically form part of the internal legal order of the Member States without necessarily requiring further implementation.
5. As far as the UK is concerned, the agreement will be binding in international law. The UK will therefore be under an obligation to comply with its provisions as a matter of public international law. It is the UK's longstanding position that it will always comply with the rule of law, which entails that it will always respect its binding international obligations in its domestic law.<sup>3</sup>
6. However, under the UK's constitutional arrangements, the agreement will not automatically be part of the UK's domestic legal order. This is because the UK has a dualist rather than a monist legal system, which means its treaty obligations do not automatically form part of its internal legal order. In this respect the UK is no different from any other dualist State, including some Member States of the EU. It will therefore be necessary for the UK to enact domestic legislation in order to give effect to the Withdrawal Agreement.

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<sup>1</sup> The dispute resolution mechanism in the Withdrawal Agreement is the subject of separate discussions.

<sup>2</sup> E.g. *Kupferberg*, 104/81, EU:C:1982:362, paragraph 23; *Demirel*, 12/86, EU:C:1987:400, paragraph 14.

<sup>3</sup> See for instance Baroness Anelay, then Minister of State in the Foreign and Commonwealth Office and now in the Department for Exiting the European Union, on 23 November 2015 (HL Hansard, vol.767, col.540): "*The noble Lord... raised an important question about whether the UK would abide by its international obligations. I can reassure him concisely that, of course, the UK will abide by its international obligations. The Government are committed to upholding the rule of law, including under any of the different scenarios for withdrawing from the European Union.*"

7. In this respect the Withdrawal Agreement will be like any other international agreement to which the UK is a party, including the EU Treaties. The UK implemented those agreements by enacting the European Communities Act 1972, which made EU law – including the principles of direct effect and supremacy – part of the UK’s internal legal order. Without that legislation, UK courts would not have been able to have regard to EU law.
8. Similarly, the UK will be bound by the Withdrawal Agreement as a matter of international law, and will be subject to whatever international enforcement mechanisms the agreement contains. If the agreement requires the UK to take steps in its domestic law in order to give effect to its international obligations, the UK will do so. Indeed, the UK’s consistent practice has been to take the necessary steps to implement treaties before it ratifies them, to ensure that it complies with its obligations under the treaty as soon as they becomes binding.

### ***Direct effect***

9. The EU Treaties are unique in requiring parties to implement them by incorporating the concept of direct effect into their domestic legal orders. That concept is specific to EU law,<sup>4</sup> and reflects the fact that the Treaties have created their own legal system which forms an integral part of the legal systems of the Member States.<sup>5</sup> The principle will therefore cease to apply to the UK when it ceases to be a Member State, and it would be inapt to require the UK to maintain it in its domestic law when it is no longer part of the legal order of which direct effect is a corollary.
10. In any event, the concept of direct effect does not in itself guarantee that Member States will continue to comply with their obligations under the Treaties. As a matter of *domestic law*, a dualist Member State such as the UK could in theory have removed direct effect from its internal legal order at any time, by repealing or amending the legislation giving domestic effect to EU law. What prevented the UK from doing so was its *international* legal obligations rather than the concept of direct effect as such. If the UK had breached its international obligations under the EU Treaties, it would have been liable to be subjected to the enforcement mechanisms provided for in the Treaties (infraction proceedings, fines, and so forth).

### ***Implementation in domestic legislation***

11. The steps that the Withdrawal Agreement will require the UK to take will of course depend on what it does and how it is worded. It might, for instance, require the UK to make sure that EU nationals who are living in the UK on a specified date have a legal right to continue living there, and impose equivalent obligations on the EU in relation to UK nationals living in another Member State on that date. There is nothing in principle to prevent the UK from implementing that requirement using domestic concepts, as long as those concepts are sufficient to achieve the result required by the agreement. Indeed, it could make the provisions more accessible and easier to use if they are properly integrated into the UK’s domestic legislative regime. On the other hand, there may be provisions in the agreement – such as those concerning social security coordination – that it would be more appropriate to implement in more general terms.
12. There is nothing unusual in the idea that international agreements should be implemented by different parties in different ways. It is normal for agreements between the EU and third

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<sup>4</sup> Although not measures adopted under the Common Foreign and Security Policy, or measures concerning police cooperation or judicial cooperation in criminal matters adopted before the entry into force of the Lisbon Treaty (see ex Article 34(2)(b) and (c) EU). Those measures nevertheless bound Member States in international law, and the UK complied with them accordingly.

<sup>5</sup> See the well-known passage in *Costa v ENEL*, 6/64, EU:C:1964:66, [1964] ECR 585, at 593-4.

countries to be implemented in different ways in the internal legal orders of the EU and the third countries, even if the obligations are expressed in reciprocal terms.<sup>6</sup> It is also normal for parties to multilateral treaties to choose their own method and means of implementation: so conventions to which the EU is a party are incorporated into EU law in a manner specific to the EU legal order.<sup>7</sup> Furthermore, agreements will generally give parties discretion about what terminology they choose to use in their domestic implementing provisions, as long as they guarantee the result provided for in the agreement (indeed, even under EU law, Member States have discretion about how they implement their obligations<sup>8</sup>). What matters internationally is that the implementing legislation gives effect in substance to the obligations undertaken by the parties to the treaty.

13. When it implements the Withdrawal Agreement in its domestic legislation, the UK will of course provide an effective means for individuals to enforce their rights under the legislation and challenge decisions of the competent authorities concerning those rights. The exact means of redress will depend on the nature of the dispute and the approach taken to disputes of that nature in UK law, but in each case the mechanism will be effective and meaningful, in accordance with normal principles of the UK's administrative law.

## **Conclusion**

14. The UK therefore considers that it is both appropriate and unobjectionable for the UK to implement its obligations under the Withdrawal Agreement by giving EU citizens enforceable rights under its domestic legislation. Such a mechanism is a constitutionally normal and appropriate way for a dualist State to give effect to its international obligations.
15. The UK will be bound by its obligations under the Withdrawal Agreement for as long as it is in force, and will be subject to whatever enforcement and adjudication mechanisms the agreement contains. The UK will meet its obligation to put in place domestic legislation meeting all the requirements in the agreement, just as it meets all its international obligations. That legislation will fully achieve the objective of granting directly enforceable rights to EU citizens, by ensuring they have a meaningful and effective way to enforce all the rights that the UK will have undertaken to guarantee.

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<sup>6</sup> For instance, the EEA Agreement imposes essentially the same obligations on the EU and the Member States on the one hand, and the non-EU parties on the other. But the agreement is implemented in different ways. In EU law, certain provisions of the EEA Agreement have direct effect, which means individuals in any Member State can rely on them directly (e.g. *Opel Austria*, T-115/94, EU:T:1997:3, paragraph 102). It also means those provisions take precedence over both the Member States' domestic laws and the EU's own secondary legislation (e.g. *Commission v Germany*, C-61/94, EU:C:1996:313, paragraph 52; *Air Transport Association of America*, C-366/10, EU:C:2011:864, paragraph 50). But the EEA Agreement does not require the non-EU States to implement it using the concept of direct effect (see Opinion 1/91, EU:C:1991:490, paragraph 27; Case E-1/07 A [2007] EFTA Court Report 246, paragraph 40; "The Handbook of EEA Law", ed. Baudenbacher, Springer 2016, pages 383-387). They may choose to implement it using a domestic concept that has the same consequences as direct effect, but that is their decision (see Case E-1/94 *Restmark* [1994-1995] EFTA Court Report 15, especially paragraph 75; Case E-1/01 *Einarsson v Iceland* [2002] EFTA Court Report 1, paragraphs 50-53; Case E-1/07 A [2007] EFTA Court Report 246, paragraph 41).

<sup>7</sup> See e.g. *Commission v Germany*, C-91/94, EU:C:1996:313, paragraphs 52-57.

<sup>8</sup> For instance, many of the rights of EU citizens are provided for in Directive 2004/38/EC, the Citizenship Directive. Member States have a discretion about how to transpose that directive into their national law, in accordance with Article 288 TFEU. The UK has transposed that directive into its national legislation, in particular the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052, as amended). These regulations use concepts that are specific to the UK, such as "qualified person" and "derivative right to reside". But that is consistent with EU law: as Article 288 TFEU says, the directive is binding as to the result to be achieved, but leaves to national authorities the choice of form and methods for achieving that result, including the terminology that they use (see e.g. *Commission v France*, 252/85, EU:C:1988:202, paragraph 5).