LEAVE ALLIANCE

Brexit Monograph 13

International quasi-legislation and the EU

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Introduction

In the 1990s, and through to the turn of the century and beyond, it was not uncommon to observe EU legislative and other initiatives being announced by ministers as if they were solely of domestic origin. Only on further scrutiny did it become evident that EU requirements were being implemented.

One small example of the "elephant in the room" that we quoted in *The Great Deception* was the design of the (then) new driver's licence which, according to a leaflet from the Driver and Vehicle Licensing Agency, had been "decided by ministers". Yet every detail of its format had been based on the "Community model driving license" made mandatory by Directive 91/493/EEC.[1]

The failure to disclose its origin was, we thought, part of an attempt by the UK government to conceal the growing power of Brussels, in what we termed "Hidden Europe". For domestic political reasons, Ministers needed to pretend they were still in charge.[2]

By early 2008, however, we were becoming aware of a similar phenomenon being played out at the global level. While politicians and the media were at last prepared to acknowledge the influence of "Europe" in the framing of legislation or policy decisions, we were finding that the true origins of many measures stemmed not from the EU but from a growing "alphabetical soup" of

[1] Christopher Booker and Richard North (2003), *The Great Deception*, London, Continuum. p.424.
[2] *Ibid*. pp 423-427

international organisations. Many of these organisations were scarcely known to even senior politicians, much less the general public.[3]

The instruments by which these bodies exercised their powers we identified as dual international quasi-legislation, a label taken from an obscure European Parliament report concerning the adoption of a directive on technical standards for speedometers. We abbreviated this to "diqule".[4,5] More prosaically, it is known as "international quasi-legislation".

At the time, the bulk of international quasi-legislation seemed to be focused on technical standards, measures which comprised the bulk of Single Market legislation. In the European Parliament report to which we referred, the authors were complaining of "legislative delegation" which would transfer much of the responsibility for future amendments of a particular sector of activity to the United Nations Economic Commission for Europe (UNECE).[6]

Currently, these instruments are recognised in contemporary legal textbooks. In Henderson's *Understanding International Law*, reference is made to the World Health Organisation and the Food and Agriculture Organisation (FAO) having developed hygiene codes for the handling of foods, which are treated as firm rules. "Without objection", Henderson observes, "many states simply adopt these codes into their national law". [7]

But it is not only states that are adopting these codes "without objection". A great deal of the legislation in the EU *acquis* either derives from international quasi-legislation, or has the potential so to do. Furthermore, quasi-legislation covers far more than simple technical standards, and increasingly dominates EU law-making.

The focus of this Monograph, therefore, is an exploration of the nature and role of "quasi-legislation". We then look at how it is used by the EU and how that use then affects the relationships between the EU in general and the European Commission in particular – as the monopoly initiator of laws – and Member States. Finally, we assess the implications of international quasi-legislation on the Brexit process.

The nature of quasi-legislation

Quasi-legislation is not new, having being discussed at length in papers from 1939.[8] Latterly, it has been described as a "dark and windowless area" of administrative law.[9]

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[3] See, for instance, this blogpost written on October 2008, entitled "Global governance: hidden in plain sight". http://www.eureferendum.com/blogview.aspx?blogno=74741

[4] https://cei.org/blog/important-new-discovery-diqule

[5] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-1999-0029+0+DOC+PDF+V0//EN

[6] *Ibid*.

[7] https://www.amazon.co.uk/Understanding-International-Law-Conway-Henderson/dp/140519765X/ p.89

[8] http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1184&context=flr

In the domestic context, it has been described as including codes of practice, guidance, guidance notes, guidelines, circulars, White Papers, development control policy notes, development briefs, practice statements, tax concessions, Health Service Notices, Family Practitioner Notices, codes of conduct, codes of ethics and conventions. Collectively, it may amount to as many as 72 different types of instrument.[10]

Because it can be applied to a wide range of instruments, "quasi-legislation" is not a term of art. Some prefer to refer to the generic "soft law". But, in general terms, it can be said to be something which *resembles* a law or which is *seemingly* law – and which has the effect of a law. Crucially, though, it is not *actually* legislation.[11]

At an international level, a distinction is made between legislative powers, which are binding on states, and quasi-legislation. International legislation, it is said, is produced by "competent organs", by majority vote. It does not require ratification or any other act of individual acceptance, and generally there is no provision for an opt-out procedure.[12] On that basis, the European Union, with its right to bind Member States, has legislative powers.

On the other hand, quasi-legislation is taken to be non-binding. It is produced by a staggering array of international organisations, through a variety of different mechanisms.[13] At one level, it can comprise codified standards, codes of practice, guidelines, recommendations or advice.[14] At another, it can comprise full-blown legislative templates, ready for adoption by legislatures as binding law, with minimal changes.[15] But, in theory, a state or bloc may accept or reject it, almost as the mood takes it.

However, the line between binding and non-binding is by no means clear-cut. At times, the distinction is not even helpful. For instance, technical standards promulgated by the "three sisters" of Codex, OIE and the IPPC, under the aegis of the FAO, are not binding on members. On their own, their primary role is to provide a reference point in disputes concerning international trade in food and related products.[16]

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[9] https://ukconstitutionallaw.org/2012/09/15/carol-harlow-how-not-to-do-things-with-rules/
[10] https://www.aph.gov.au/binaries/senate/pubs/pops/pop15/pop15.pdf
[11] *Ibid*.
[12] http://www.zaoerv.de/56_1996/56_1996_3_a_628_667.pdf
[13] http://www.brugesgroup.com/images/issues/alternatives_to_the_eu/the_norway_option_pdf.pdf , see pp 10-28
[14] *Ibid*.
[15] Such as the UNCITRAL Model Law on Public Procurement, https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf
[16] For a discussion, see Chris Downes (2014), The Impact of WTO SPS Law on EU Food Regulations, Springer International, Switzerland., see p 205 *et seq*

Yet many of these codes are adopted by the EU "without objection", whence they become EU legislation. What marks out the adoption process, though, is that it is not passive. As a party to the WTO Agreement on Technical Barriers to Trade (TBT Agreement), and the parallel Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the EU is obliged (subject to certain exemptions) to use "relevant international standards" as a basis for their own technical regulations.[17,18] As to relevance, the global standards promulgated by the "three sisters" easily qualify.

Once the EU has converted the standards into EU law, adoption by Member States becomes mandatory. In practical terms, therefore, there is no difference between international legislation and this type of quasi-legislation. For EU Member States, the adoption of both is mandatory.

In other areas, quasi-legislation does not even have to be formally adopted in order to become binding at state level. UNECE fruit and vegetable marketing standards have no direct binding effect in the form that they are produced. However, the EU has repealed all but ten of its own detailed standards, in favour of a "general marketing standard" (GMS), to which all but exempted products must comply. Where no detailed standards are published, producers are referred to the relevant UNECE standards, compliance with which is deemed to satisfy the GMS.[19] Nowhere, though, do we see these UNECE standards appearing in the Union *acquis*.

Between the same two organisations, a completely different mechanism is used in vehicle type-approvals. Independently, on 6 June 1952 – five years before the Treaty of Rome – UNECE established a Working Party on the Construction of Vehicles, known as WP.29. Its objective is "to initiate and pursue actions aimed at the worldwide harmonisation or development of technical regulations for vehicles". In March 2000, WP.29 became the "World Forum for Harmonization of Vehicle Regulations", working to three sets of Agreements, lodged respectively in 1958, 1998 and 1997.[20]

These Agreements have treaty status and, as the EU is a signatory to all three, it is bound under international law to adopt relevant standards into its own *acquis*. On 5 September 2007, it adopted Directive 2007/46/EC, "establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles".[21] Through this, UNECE Regulations to which the Community had acceded were considered to be part of the EC type-approval of a vehicle in the same way as the separate directives or regulations.[22] In this respect, UNECE has become an integral part of the law-making apparatus of the European Union.

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[17] https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm
[18] https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm
[19] http://ec.europa.eu/agriculture/fruit-and-vegetables/marketing-standards/index_en.htm
[20] http://www.unece.org/trans/main/wp29/faq.html
[21] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007L0046&from=EN
[22] *Ibid*, Article 34.

This tends to support the more recent view that: "The formalistic notion that international law is simply a set of black letter rules is outdated". Authors Dunoff and Pollack thus assert, "it is no longer clear what exactly constitutes international law, and what does not".[23] As regards quasi-legislation, what starts of as being non-binding can, through a series of steps, become binding.

Coalitions of the willing

Further exploring the idea that quasi-legislation is necessarily non-binding, we see a process where standard-setters act as service-providers for their "clients". There is no question of, nor any need for, compulsion. The "clients" in the first instance define their preferred outcomes, and the general mechanisms by which they wish to achieve those outcomes. These "service-providers" then produce legislative models or templates which their "clients" adopt and process into legislation to apply within their own separate jurisdictions.

An example of a "service-provider" is the Basel Committee on Banking Supervision (BCBS). Established by the G-10 group of countries in 1974, it was designed as a forum for regular cooperation between its 28 member countries on banking supervisory matters. Its aim was and is to enhance financial stability by improving supervisory knowhow and the quality of banking supervision worldwide.[24]

The Committee reports to an oversight body which comprises central bank governors and (non-central bank) heads of supervision from member countries. Countries are represented on the Committee by their central bank and also by the authority with formal responsibility for the prudential supervision of banking business where this is not the central bank.[25]

Currently, its functions have evolved to include the formulation of supervisory standards and guidelines. It recommends sound practices "in the expectation that individual national authorities will implement them".[26] Despite all this, the BCBS does not possess any formal supranational authority and its decisions have no legal force. Rather, the BCBS relies on its members' "commitments", set out in its Charter – which also have no legal force.[27] Thus, there is no question of any compulsion. But its quasi-legislation is treated as binding by BCBS members and has been adopted by many countries in the world, including the United States.[28,29]

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[23] Jeffrey L. Dunoff & Mark A. Pollack (2012), Interdisciplinary Perspectives on International Law and International Relations, Cambridge University Press. P.269
[24] https://www.bis.org/bcbs/history.pdf
[25] *Ibid*.
[26] *Ibid*.
[27] https://www.bis.org/bcbs/charter.pdf
[28] http://www.bis.org/bcbs/basel3.htm
[29] http://www.federalreserve.gov/bankinforeg/basel/USImplementation.htm

The most recent output of the BCBS is the so-called Basel III package on capital adequacy. This has also been adopted by the EU and implemented as the CRD IV package, even though the EU is not formally a member of the BCBS. Effectively, the EU is using this organisation as a means of realising its own policy objectives.[30] Not least of this, in the banking sector, is the need to avoid what is known as "regulatory arbitrage", whereby internationally mobile banks can choose to locate their main activities where the regulatory system is (for them) at its most benign.[31] To deal with this and other such issues, the EU has insisted that international banking regulation has defined the regulatory parameters in EU Member States.[32]

Crucially, the BCBS has become part of a dynamic system which is evolving into a global regulatory mechanism. One clue to this development lies in its membership of the Financial Stability Board (FSB), whence it claims to participate in the FSB's work "to develop, coordinate and promote the implementation of effective regulatory, supervisory and other financial sector policies".[33]

The FSB in turn owes its origin to an initiative from the G7 group of countries, extended and expanded by the G20 group.[34] Its task is to implement a commitment made by the G20 nations in November 2008 at its Washington summit. They pledged "to enhance our cooperation and work together to restore global growth and achieve needed reforms in the world's financial systems".[35] Then, in London in April 2009 they agreed to "take action to build a stronger, more globally consistent, supervisory and regulatory framework for the future financial sector, which will support sustainable global growth and serve the needs of business and citizens".[36]

From this has emerged a "compendium" of standard-setting bodies. As well as the BCBS and the FSB, there is the Committee on the Global Financial System, the Committee on Payments and Market Infrastructures, the Financial Action Task Force on Money Laundering, the International Association of Deposit Insurers, the International Association of Insurance Supervisors, the International Accounting Standards Board, International Auditing and Assurance Standards Board, the International Auditing and Assurance Standards Board, the International Monetary Fund, the International Organisation of Pension Supervisors, International Organisation of Securities Commissions, Joint Forum (JF), the Organisation for Economic Cooperation and Development and the World Bank.[37]

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[30] See: Marise Cremona & Hans-W Micklitz (eds) (2016), Private Law in the External Relations of the EU, OUP Oxford.
[31] https://www.princeton.edu/~ies/IES_Essays/E185.pdf
[32] http://www.eba.europa.eu/regulation-and-policy/implementing-basel-iii-europe
[33] See the BCBS Charter, *op cit*.
[34] http://www.fsb.org/about/history/?page_moved=1
[35] http://www.g20.utoronto.ca/2008/2008declaration1115.html
[36] https://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf
[37] http://www.fsb.org/what-we-do/about-the-compendium-of-standards/wssb/

This constitutes a vast regulatory hub, defining regulation for a global industry which filters down to regional, sub-regional and national levels, affecting every sector and activity. It amounts to a regulation "factory", building an emerging corpus of global administrative law. And the effective tool of this system is quasi-legislation. Whether binding or not, no international trading nation can afford to ignore it.

Another emerging regulatory hub is the *ad hoc* group employing UNECE "International Model" of regulation, hosted by its WP.6 Working Party on Regulatory Cooperation and Standardisation Policies.[38] WP.6 is a forum for dialogue among regulators and policy makers, where a wide range of issues is discussed, including technical regulations, standardisation, conformity assessment, metrology, market surveillance and risk management. It makes recommendations that promote regulatory policies to protect the health and safety of consumers and workers, and preserve our natural environment, without creating unnecessary barriers to trade and investment. While they are non-binding, they are widely implemented in UNECE member states and beyond.[39]

Pioneered in relation to the telecoms industry, the "International Model" relies on the WTO TBT Agreement, creating a framework for the practical implementation of technical harmonisation, drawing from existing schemes for good regulatory practice. As catalogued by the WTO, these set out the formal mechanisms for implementing the Agreement on TBT.[40] The organisations involved include APEC, ASEAN, OECD, UNECE and the World Bank.[41]

At this stage, the "Model" provides a set of voluntary principles and procedures for sectoral application for countries that wish to harmonise their technical regulations. Some international technical regulations exist, but they tend to be cumbersome and burdened with details and have proven to be difficult to prepare. As a consequence, they can be difficult to amend once in place. Furthermore, detailed agreements between multiple regulatory authorities are frequently difficult to obtain, and such regulations tend not to achieve full consensus.

Under the aegis of UNECE, therefore, interested countries and institutions are brought together to discuss and agree a regulatory framework comprising "common regulatory objectives" (CROs). These are passed to international standardising bodies, which provide a forum for all interested parties (including regulatory authorities), and have established a degree of trust at the international level.

[38] http://www.unece.org/fileadmin/DAM/trade/wp6/Recommendations/Rec_L.pdf, accessed 20 April 2015.
[39] http://www.unece.org/trade/wp6/aboutus.html, accessed 20 April 2015.
[40] http://www.unece.org/fileadmin/DAM/trade/wp6/documents/ref-docs/W341.pdf, accessed 20 April 2015.
[41] http://www.unece.org/fileadmin/DAM/trade/wp6/documents/ref-docs/W341.pdf, accessed

On a procedural level, when the need for regulatory convergence has been identified and supported by governments, the "model" facilitates discussions and agreement on which safety, environmental or other legitimate requirements should be met by technical regulation. On the basis of such "agreed and concrete legitimate concerns" – which become the "common regulatory objectives" - countries then agree which existing international standards could provide for technical implementation or, where necessary, the elaboration of new international standards.[42]

Whenever a new or revised technical regulation is being prepared, regulators then follow the principles in the WTO/TBT Agreement, adopting the relevant international standards. A wide range of telecom standards have now been agreed, in relation to personal computers (PCs); PC peripherals, legacy Public Switched Telephone Network (PSTN) terminals; Bluetooth, Wireless Local Area Network (WLAN); Global Standard for Mobile Telecommunication (GSM); and International Mobile Telecommunications.[43] Further sectoral initiatives have been concluded on earth-moving machinery, equipment for explosive environments and pipeline safety.[44]

Where standards are promulgated by the international standards bodies, specifically the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC), these are then adopted as European (EU) standards, by virtue of the Vienna and Dresden agreements on technical standards.[45] By this route, quasi-legislation produced by the WP.6 mechanism can be automatically incorporated into the EU *acquis*.

Implications for Brexit

One of the main advantages of withdrawing from the EU, it is argued, is the return of power to Westminster, permitting the UK to make its own laws – an issue explored in the previous Monograph.[46]

It is certainly the case that membership of the EU undermines parliamentary authority as legislative approval (such that it is) is exercised by the Member State executives, by-passing parliaments' scrutiny and placing legislation beyond their reach. Interestingly, though, the adoption by the European Commission of quasi-legislation in many ways replicates that flaw at EU level, excluding the European Parliament from full participation in the legislative process. Certainly, in the original reference to dual international quasi-legislation, the complaint was that its use effectively by-passed the European Parliament.

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[42] http://www.unece.org/fileadmin/DAM/trade/ctied7/trd-03-007a1e.pdf, accessed 20 April 2015.

[43] http://www.unece.org/trade/wp6/SectoralInitiatives/Telecom/CROs.html, accessed 20 April 2015.

[44] http://www.unece.org/tradewelcome/areas-of-work/working-party-on-regulatory-cooperation-and-standardization-policies-wp6/sectoral-initiatives.html, accessed 20 April 2015.

[45] http://www.cencenelec.eu/intcoop/StandardizationOrg/Pages/default.aspx

[46] http://www.eureferendum.com/documents/BrexitMonograph012.pdf

The question is whether the UK government on securing withdrawal from the EU would also be bound in the same way by quasi-legislation, or whether it would wish to be bound to the same extent. Should it apply to the same extent, then what occurs within the EU will continue once the UK has left. Parliament will still be by-passed and the accountability will be limited.

Given the scope and increasing extent of quasi-legislation, though, it is hard to see that its grip on the legislative process could be allowed to slacken when the UK reclaims its independence state. The application amounts to a bargain between national executives and global bodies (which largely comprise delegates nominated or approved by national executives), where national executives surrender jurisdictional authority in the greater interest of producing uniform rules across a wider range of actors. But a necessary (if sometimes unintended) result is that democratic processes are sidelined, and any sense of accountability will remain lost, even after Brexit

Nevertheless, from a national perspective, withdrawal does confer advantages. Where, for instance, the EU assumes exclusive rights of representation on global bodies, and control over votes cast, the UK will be free once more to state its own case and vote in accordance with its interests. It can also form coalitions with non-EU partners, seeking to frustrate EU ambitions, where it is to our advantage to do so. Further, the UK regains its right of initiative, being able to make its own proposals to international bodies, without having to abide by a "common position" agreed with the EU Member States.

That notwithstanding, there is little gain for the Westminster parliament, unless the UK government is prepared to modify (i.e., reduce) its own powers – such as in limiting itself to mandates dictated by parliament. But even then, where obligations arise from international agreements, the executive is bound to implement them. As long as we see the increasing globalisation of regulation, removing EU law simply exposes its global origins, without reducing its impact.

One can compare the situation with the victim in a horror movie, trapped alive in an as-yet-unburied coffin. Having broken through the lid in a bid to escape, he finds to his consternation that there is another lid over the first. The UK may escape from the maw of EU legislation but the advance of globalisation will mean that, in practice, there is very little change.

Conclusions

Standing back from the detail rehearsed in this Monograph, one could argue that the UK's membership of the EU has shielded it from having to acknowledge the full force of globalisation. The horizons of many politicians and the media stretch only as far as Brussels. The impact of global measures is scarcely recognised to the extent that, even when they arise entirely from the intervention of global bodies, they are still attributed to the EU.

Outside the EU, exposed to the howling gale of globalisation, the UK will once more have to stand up for itself, without the protective barriers of the EU institutions and the political and economic strength of the other 27 Member States.

Even acting as a bloc, the EU itself has struggled to make its voice heard. While it remains committed to global governance, it also recognises the limits of its own power, arguing that resisting change risks triggering the erosion of established global institutions and the emergence of alternative groupings to the detriment of all EU Member States.[47]

On its own, the UK is in no better position, other than enjoying greater flexibility – with a commensurate speed of response – and the ability to form permanent or *ad hoc* coalitions to strengthen its own bargaining positions.

Globalisation itself does bring advantages, opening up fora for discussion and mechanisms for friendly (and not so friendly) coercion, bringing "incompetent states" up to standard and enhancing the functionality of the global trading system, the fight against terrorism and broader security issues.[48] This, however, comes at a price, and it is one where risks and rewards are to some extent proportionate to the degree of engagement.

Certainly, the EU is committed to the process of globalisation – for all the perceived rewards that it can bring – but it will be for a post-Brexit UK to decide whether it wants to match or exceed that degree of engagement. As an alternative, it can retreat into isolation and a more nationalistic agenda.

As an independent state, at least that is a decision the UK can make for itself. But, if it is to be an informed decision, then it must be conscious of the emerging phenomenon of quasi-legislation and accept that, to a great and increasing extent, legislative freedom will be circumscribed if it seeks enthusiastically to embrace globalisation.

Quasi-legislation is now the dominant force in globalisation and will be a central issue for parliament and the nation to confront in a post-Brexit world, where all the constraints and frustrations of active participation in the global community can no longer be visited on EU membership. For good or for bad, in a post-Brexit world we will only have ourselves to blame for the ills that affect us.

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[47] https://europa.eu/globalstrategy/sites/globalstrategy/files/eugs_review_web.pdf
[48] http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4785&context=lcp