INSTITUTE FOR GOVERNMENT

Supervision after Brexit

Oversight of the UK's future relationship with the EU

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About this report

The Government has now brought forward proposals for a future relationship with the European Union, but has said little about the institutions that will supervise the application of the rules day-to-day. This paper explains why a proposal on supervision will be needed, and discusses some of the options open to the Government.

Our Brexit work

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Summary

The UK's compliance with its European Union (EU) obligations is supervised by the European Commission and the EU agencies. They monitor how, and how promptly, EU legislation is converted into domestic law, and the compatibility of laws passed by Parliament with the EU treaties. They also keep an eye on the actions of government, individuals and businesses, to ensure that they are following EU law. If the Commission suspects non-compliance, it can take enforcement action, writing letters, putting public authorities on notice and, ultimately, bringing legal proceedings at the European Court of Justice.

The UK has proposed that its long-term relationship with the EU be overseen by a governing body and a joint committee with representatives of both sides. This setup would be normal for a free trade agreement. However, the UK is proposing a much closer future relationship, particularly on goods, and the EU is seeking commitments to maintain standards in so-called 'level playing-field' areas such as the environment, social protection, competition and state aid.

> **The EU will offer deep market access to the UK only if it is confident that the UK is playing by the rules**

The EU will offer deep market access to the UK only if it is confident that the UK is playing by the rules. In particular, the EU will want to be sure that the UK is keeping its statute book in line with whatever commitments it has made, and the rules of the agreement are properly enforced. So far, the Government has not said much about who should do that enforcement after Brexit. This remains a big gap in its proposals.

In this paper, first we explain what the Government has said so far about supervision, then set out the seven questions that the Government still needs to answer to fill the gaps in its plans. Ministers will then have to take these proposals to the EU, as one part of a wider plan for the governance of the relationship, to establish what is negotiable.

1. Does the UK want its compliance to be supervised by EU, European Free Trade Association or UK institutions?

In some areas of law, or for some types of supervision, the UK may be happy to submit to some supervision by the European Commission, as Switzerland, Ukraine and other third countries do. Alternatively, the UK could attempt to 'dock' to the European Free Trade Association (EFTA) Surveillance Authority, which does a similar job for the European Economic Area (EEA)–EFTA states. If it does not want to do either of these, the Government could propose 'beefing up' the Joint Committee with a secretariat, enabling it to act as a UK–EU supervisory body in Brussels, although the EU is likely to resist any proposal that appears to put the two sides on an equal footing. Or, the UK might want to do its own supervision.

The Government's statements so far indicate that – at least as far as the domestic application of rules is concerned – it prefers the latter approach, and wants to 'take back control' of supervision. If the Government does bring these functions from Brussels to the UK, then several other questions about the design of the new regime arise.

2. Does the UK want to establish a single, central authority to keep tabs on government bodies' compliance, or rely on a more decentralised network of specialised supervisory bodies?

If the UK wants to do its own supervision, and the EU is willing to discuss this, then the Government faces a further choice. It could create a single, centralised, supervisory authority (a UK supervisory authority) to fill the gap left by the European Commission. Or it could rely on a decentralised network of specialised supervisory bodies, some of them reporting to the devolved governments rather than the UK government. Many specialist bodies already exist for particular areas of regulation. Some of them would need to change their remits, and it is likely that the Government would have to create some new bodies to fill the gaps left behind by the Commission too.

A single authority has some advantages. It would:

- have a catch-all remit, so that nothing could fall through the cracks
- provide an extra layer of assurance for economic operators and the EU
- allow existing public bodies to get on with their jobs, without changes to their remit or governance
- be able to ensure consistency between UK government bodies and the responsible bodies in the devolved administrations.

However, this also presents some challenges. It would be difficult to design, cost more and be easily outgunned in terms of expertise, both by the bodies it was overseeing in the UK and by the Commission.

3. How can the Government ensure that domestic supervisory authorities are able to hold government to account effectively?

If a supervisory authority – either a single central one or one that forms part of a network – has its chair and board appointed by ministers, its budget set by ministers and is accountable through ministers to Parliament, it may struggle to convince the EU or businesses that it is credibly independent of government and able to take enforcement action against government departments.

Therefore, the Government needs to work out how it will guarantee UK bodies' independence from ministerial influence or interference. This could involve:

- making them accountable to parliamentary committees, rather than government departments
- giving them their own budget lines, rather than having their funding sliced out of other departments
- giving parliamentary committees a role in the appointment of senior officers.

The Government will also need to consider what powers to give to any new bodies, ranging from the power to request information and make reports to Parliament, to the powers to issue binding notices, levy fines or bring court cases against public bodies.

Neither are the bodies likely to be sufficiently effective if they face the threat of abolition, particularly when they need to take controversial or politically sensitive enforcement decisions. Therefore, the Government needs to consider how to entrench any authorities: for example, by undertaking an international law obligation, in a UK–EU agreement, to create, maintain and adequately resource them.

4. How will the UK provide assurances to the EU that the UK government is not 'marking its own homework'?

Even a UK supervisory body that is robustly independent of central government is still a UK body. Given that the UK is effectively asking to participate in the Single Market for goods, governments and businesses across the Channel will want to know that the rules of that market are being applied in the same way, and with the same vigour, in the UK as in the EU.

There are various ways in which the UK could involve the EU in supervision, and so offer European partners some assurance. These tools vary in their intrusiveness. Relatively unintrusive tools include:

- informal confidence-building measures, such as secondment programmes
- duties on the authorities of each side to co-operate and exchange information with one another
- duties to work towards the good functioning of the agreement
- duties to report regularly to a joint committee of UK and EU officials.

More intrusive measures include: offering the EU the right to send an observer to meetings of the boards of relevant supervisory authorities; or even giving some role to the Joint Committee of ministers and diplomats from the UK and EU in taking supervisory decisions.

5. What are the supervisory arrangements for commitments outside the 'common rulebook'?

Although supervision will be most important for regulations inside the 'common rulebook', where the UK proposes to align fully with the EU, the Government needs to consider whether other obligations in the agreement will be covered by the same governance arrangements.

The supervision of so-called 'level playing-field' obligations in areas such as the environment and labour will need particular attention, as the UK and EU are proposing clauses for the future relationship that go significantly beyond those in most trade agreements – and in the past, such commitments have been difficult to enforce. Many of these will, as now, fall within the powers of the devolved governments. Commitments on goods that fall outside the 'common rulebook' – the 'enhanced equivalence' regime for financial services, mutual recognition arrangements for other services, thematic co-operation in areas such as data and research – will also need supervision of some kind.

6. Will the same arrangements apply to supervision of transposition as to supervision of application?

Although a UK government body could be given powers to take enforcement action against other government bodies for failing to apply EU law properly, it is harder to imagine it taking enforcement action against a sovereign Parliament for failing to transpose a treaty obligation on to the statute book in the first place, as the Commission can do now.

Yet if the 'common rulebook' is to evolve over time, with new rules incorporated into it as the EU's own rulebook changes, then some institution will need to monitor the UK's transposition of those new obligations. Any disputes about whether the UK has properly transposed new rules into its domestic law would have to be dealt with in joint committee and, ultimately, by the dispute resolution mechanism.

The practical work of monitoring the UK's progress on transposition might be done by a UK supervisory authority which would report to the Joint Committee, but take no action itself. Another option would be to ask the European Commission to continue to do that work. Finally, the parties could task the Joint Committee with carrying out this technical work, but this would mean creating and resourcing a bureaucracy or secretariat to sit underneath the committee.

7. Will the Government introduce extra elements of domestic assurance to stop Parliament from legislating in breach of the UK's obligations?

Supervision is about more than supervisory institutions. The Government might also want to put in place systems to stop future parliaments from legislating in a manner inconsistent with the UK's obligations under the future relationship treaty. For example, ministers could be obliged to explain why they believe proposed domestic measures are compatible with the UK's obligations under the agreement, as they are obliged to do with respect to the European Convention on Human Rights under the Human Rights Act 1998, and as Switzerland does to maintain compliance with its EU obligations. Alternatively, the courts could be empowered to set aside any government decisions or legislation that are incompatible with the UK's obligations under the UK–EU treaty, or to issue a 'declaration of incompatibility' as a prompt for Parliament to think again.

In specific areas of regulation – such as state aid, the environment and citizens' rights – the Government has begun to think about the design of a supervisory regime. However, ministers' proposals so far have been piecemeal. The Government needs to fill in the gaps if it is to get the deep access to the European market that it seeks.

1. Introduction

The Government's July white paper on the UK's future relationship with the EU sets out its proposal for the governance of that relationship. However, that proposal has a hole in it. Although ministers have set out their plans for keeping the UK in step with EU law and for the resolution of disputes, they have not said much about the institutions they want to supervise the application of the rules and to make sure that both sides are meeting their commitments day-to-day. That is a role the European Commission plays now. This paper explains why a proposal on supervision will be needed, and discusses the principal options open to the Government.

In July, Prime Minister Theresa May agreed on a new Brexit plan with her Cabinet at Chequers. This plan involves quite a high degree of regulatory alignment with the EU. In particular, the Government has proposed a 'common rulebook' for any rules on goods where alignment is necessary to provide for frictionless trade at the border. Rules on state aid would also be in the 'common rulebook', but in other areas integration would be looser.[1]

Robust governance is not just something that the EU will want to see. It is also something that the UK should want

This is much more regulatory alignment than would be found in a typical free trade agreement. Therefore, the governance of the deal will be crucial. If the UK and the EU are opening their markets to one another on the basis of common rules, then both sides will need to feel confident that those rules are being rigorously applied and enforced.

The EU has the most highly developed enforcement system of any regional trade bloc, with multiple, well-established legal procedures and robust sanctions to ensure that member states, and private parties within member states, are kept in line with EU law. If the Government wants access rights in any area of the market similar to those that it enjoys now, it will need to put forward a proposal for governance of the new system that is similarly robust. The Government is unlikely to get very far with its proposals if the EU perceives the governance of the proposed new system to be lax.

However, robust governance is not just something that the EU will want to see. It is also something that the UK should want. A reliable system of enforcement will be needed to maintain a stable, predictable, regulatory environment for citizens and businesses, underpinned by the rule of law.

On some aspects of governance, ministers have made substantive proposals. The Government's white paper on the future relationship contains plans for a dispute resolution mechanism, and a role for the European Court of Justice (ECJ) in the interpretation of the agreement. It also contains proposals for the political governance of the relationship: a governing body to set direction at the political level, and a joint committee to oversee the good functioning of the agreement at the official and technical level.

This paper focuses on an aspect of enforcement that has attracted much less attention so far, which we call 'supervision'. This has several aspects, which sometimes overlap:

- supervision of UK government bodies – ministerial departments, devolved administrations and public bodies – to ensure that they are correctly implementing and applying applicable treaty rules

- supervision of market actors – to ensure they are following the rules correctly

- supervision of UK and devolved legislators – to ensure that they are transposing treaty obligations into domestic law, and that they are not legislating contrary to treaty obligations.

The first of these, the supervision of UK government bodies, is our main focus, although we also touch on the supervision of legislation in the final sections of this paper. It is important to note that, ultimately, supervisory authorities in the EU can act on non-compliance of any kind by using coercive powers: issuing enforcement notices telling the UK how to comply, levying fines and, in some cases, taking the Government to court.

The question is: whose responsibility will it be to perform these functions, and how will they do so? This question has already surfaced in the context of particular sets of rules, for example those on the environment.[2] However, ministers now need to think about the question more systematically.

2. State of play

The Government's governance proposals provide more clarity, particularly on judicial enforcement and dispute resolution

The Government's July white paper on the future relationship between the UK and the EU contains an important chapter on governance. For the first time, the Government has put forward some detail on the institutions that it wants to underpin the future relationship. In this section we sketch out the key features of the Government's governance proposals.

Most parts of the relationship, the Government says, should be covered by an 'overarching institutional framework'. This would consist of a governing body made up of leaders and ministers from both sides, which would meet twice a year to set the political direction for the relationship. A joint committee of diplomats and officials from both sides would meet more regularly to manage and monitor the implementation of the agreement, and resolve any disputes early through negotiation.

That committee would also be responsible for determining which new EU laws should be incorporated into the UK–EU agreement. Under the Government's Chequers proposal, the committee would decide whether a rule should be incorporated by determining whether it is 'necessary to provide for frictionless trade at the border'.[1] If the two sides could not agree in joint committee on whether a new rule was in scope or not, then one side could request 'financial compensation' from the other and, if this were not possible, parts of the agreement could be suspended.

It is likely that such disagreements would end up being decided through the Government's proposed arrangements for dispute resolution (discussed below). If the two sides were to agree that a rule is in scope, and to incorporate that rule into the agreement, the UK Parliament would then have to make a further decision to incorporate that rule into UK law. If Parliament failed to do that, then the UK would be in breach of its international obligations. This would mean that the EU could bring proceedings through the dispute resolution mechanism, which could result in parts of the agreement being suspended. The potential to suspend parts of the agreement also exists in the European Economic Area (EEA) but the provisions have never been used, so it is difficult to predict how this would play out in the UK case.

The Government has also put flesh on the bones of its plans for legal dispute resolution and enforcement mechanisms. In her first Conservative Party conference speech as leader, Theresa May promised to end the jurisdiction of the European Court of Justice (ECJ) after Brexit. At the time, many observers in both the UK and the EU27 interpreted this as a 'red line', but over the past year that line has been growing steadily pinker. In the Government's paper on dispute resolution and enforcement published in summer last year, the Government did not make any clear proposals but nuanced its position slightly. It promised to end the 'direct' jurisdiction of the court,

and gave some examples of more distant relationships with the ECJ, without saying that they were unacceptable.[2] In her Mansion House speech in March, the Prime Minister went a little further still, saying that the UK would "respect the remit" of the ECJ in areas where the UK is aligned to EU law, and "explore with the EU, the terms on which the UK could remain part of EU agencies".[3]

The July white paper spells out for the first time what this would mean in practice. It says that where there is a dispute between the UK and the EU, this would be addressed at first in a joint committee, with diplomatic representation from both sides. If it could not be resolved there, then the dispute could be referred to a panel of arbitrators, including members from both the UK and the EU, for a binding ruling. If, in the view of those arbitrators, the case depended on the interpretation of a rule of EU law, they could then refer that interpretative question to the ECJ for a binding ruling. The paper also implies that in some cases, the Joint Committee could refer such questions straight to the ECJ without first going through an arbitral tribunal.

This is an important move by the UK. As we explained in *Dispute Resolution after Brexit*,[4] the EU has a very particular and precise view of its 'legal autonomy'. The ECJ has ruled repeatedly that only the ECJ, and no other tribunal, can bind the EU to a particular interpretation of EU law. Initial proposals for a 'European Economic Area' court, for example, which would have allowed another court to interpret rules based on EU law in the EEA Agreement, were found by the ECJ to be incompatible with the EU treaties.[5]

Because the treaties between the UK and the EU are set to contain rules of EU law, and will be binding on the EU, they stand little chance of being accepted by the EU unless they include a mechanism to have EU law issues resolved by the ECJ. Thus, the Government's concession on the ECJ opens the door to an agreement in which the UK could formally align to rules of EU law. How far that alignment might go is a matter for future negotiation with the EU, but is already the subject of fierce domestic debate.

The white paper also makes explicit that courts in the UK will no longer be able to make references for a preliminary ruling to the ECJ. However, it does say that in areas covered by the 'common rulebook', UK courts would be obliged to 'pay due regard' to the case law of the European Court, in order to ensure consistent interpretation of the rules between the UK and the EU.[6] If this were to fail, and one side believed that the courts of the other had interpreted a rule incorrectly, its officials could raise this as a dispute in the Joint Committee and, ultimately, submit it for adjudication at the ECJ.

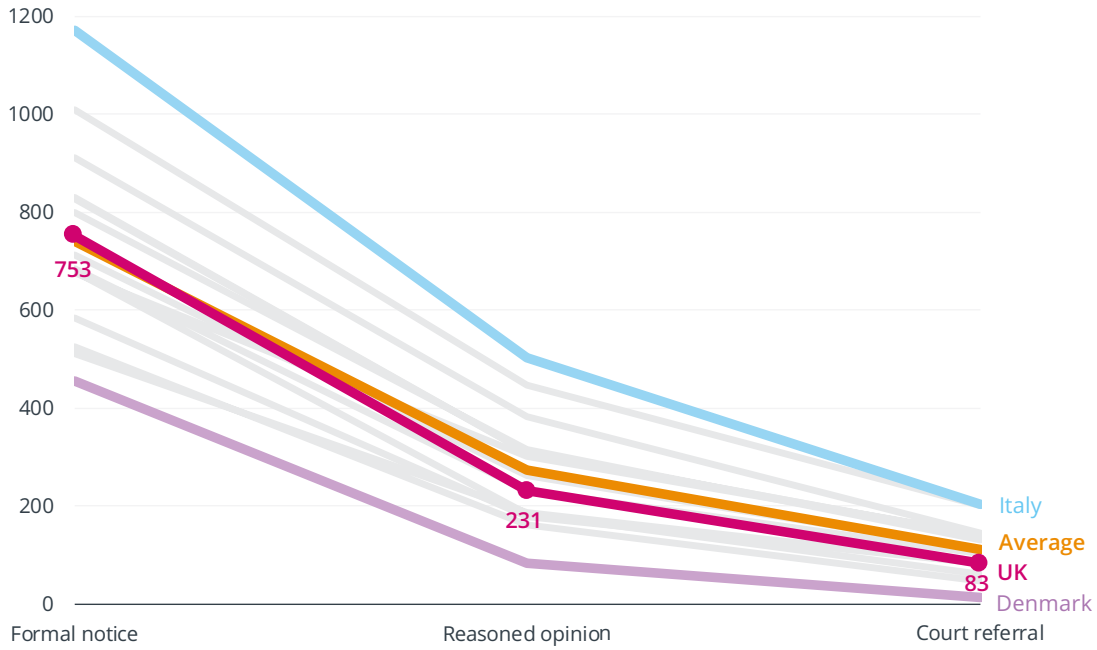
The Government has left gaps in its governance plans

Most enforcement of rules does not happen in court. Courts are the solution of last, not first, resort. Instead, effective enforcement takes place through a system of supervision and surveillance, in which public authorities monitor the day-to-day application of those rules, and encourage or enforce compliance. If any proposal for a 'common rulebook' with the EU is to fly, ministers will have to show how, after Brexit, the UK will ensure consistent application of the common rules. Other commitments, even when they are not to full alignment with EU law, will need to be enforced too.

For EU member states, supervision of the practical application of EU law involves domestic regulators, governments, the EU agencies and the European Commission. In most areas, direct supervision of the marketplace is handled by domestic bodies which do practical enforcement work. That work may be overseen by relevant EU agencies and the Commission, which initiate investigations. This is the level at which supervision of UK government bodies takes place.

For example, in the area of food standards in the UK, inspectors from the Food Standards Agency and Food Standards Scotland are responsible for inspections of food processing facilities. Occasionally, the European Food Safety Authority or DG Health and Food Safety in the Commission will conduct investigations alongside one of the UK bodies, and it may audit their work.[7] The Commission has the power to ask for evidence that national governments or regulators have taken certain actions – for example, inspecting abattoirs. If this is not forthcoming, the Commission might bring a formal enforcement action against the UK to put on further pressure. Such a case might eventually reach the ECJ although, as Figure 1 shows, most cases are resolved before that point. Because the extent and nature of harmonisation varies between sectors, the division of labour between domestic and EU authorities varies too. Some areas of regulation, such as aviation safety, involve a bigger role for EU authorities.* In other sectors, such as telecoms, the role of national regulators is significantly more important.

Figure 1: Number of cases reaching each stage of the infringement process by EU country, 2003–2016



Source: Institute for Government analysis of the European Commission's database of infringement decision

In some areas, the focus of EU enforcement is more narrowly on the actions of government itself. In the area of state aid, for example, the European Commission makes decisions about whether government decisions to grant financial benefits to companies are compatible with the EU treaties.

* Here, the European Aviation Safety Authority has more direct interaction with economic operators in member states, issuing authorisations and performing inspections.

The European Commission also conducts supervision of legislation, keeping tabs on member states' transposition of EU directives into domestic law. If a member state fails to communicate to the Commission that its legislative institutions have transposed a directive into domestic law, the Commission can initiate infringement proceedings against that state and, ultimately, take the state to court at the ECJ. Similarly, if the Commission believes that a member state has introduced legislation which renders that country in breach of its EU treaty obligation, it can initiate infringement proceedings.

The Government has yet to give a clear indication of what system it envisages to fill the gap on supervision when the Commission no longer fulfils these roles for the UK (see Figure 2).

Other holes in the Government's governance plans remain too. In particular, proposals for a 'parliamentary lock' on the incorporation of new treaty rules into domestic law are sketchy. The Government has been extremely vague about the system of remedies that should be used if the UK and EU disagree about whether a new EU rule should apply to the UK, or if Parliament declines to incorporate a rule into UK law that the Government has already agreed to incorporate into the treaty. (We do not deal with these issues in detail in this paper.)

The Government has ideas on the supervision of particular areas of regulation, but they do not add up to a coherent plan

In a few specific areas, the Government has begun to look at the issue of supervision after Brexit: either to offer assurances to the EU, or in reaction to domestic concerns about future 'governance gaps'. These generally concern supervision of how rules are applied, rather than supervision of whether they are incorporated in the first place.

Citizens' rights

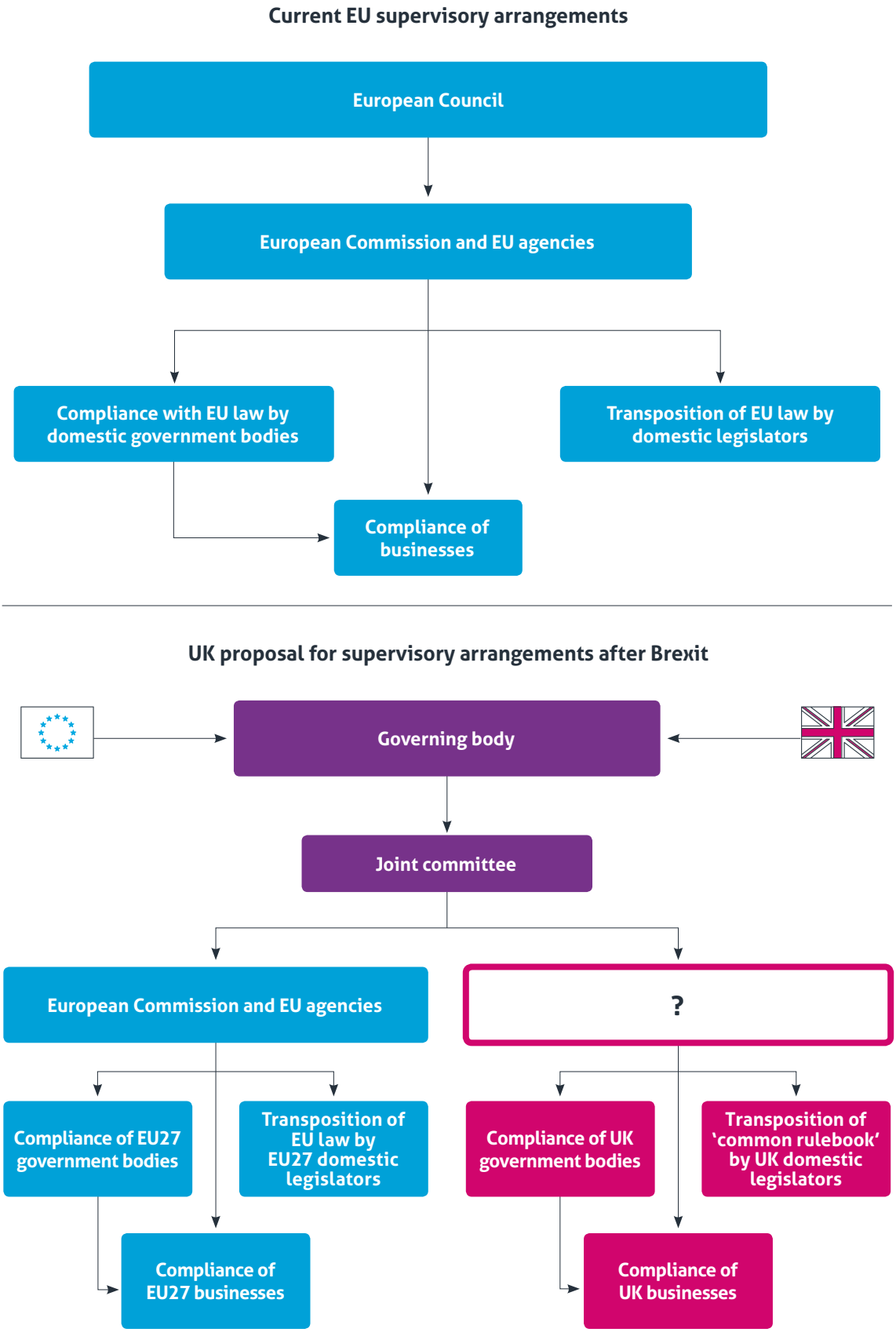
The Government has addressed the supervision of the citizens' rights provisions in the Withdrawal Agreement. The UK has promised to set up an independent monitoring authority to oversee the application of EU citizens' rights provisions. The independent monitoring authority will be established through the EU (Withdrawal Agreement) Bill, and take over from the Commission as supervisor of the implementation of the citizens' rights aspect of the deal at the end of the transition. The rights of UK citizens in EU countries will continue to be overseen by the Commission.

The draft Withdrawal Agreement, published in March, gives some detail on the powers and supervision of the independent monitoring authority. The authority shall:

- 'have equivalent powers to those of the Commission acting under the Treaties to conduct inquiries on its own initiative',[8] concerning breaches of citizens' rights commitments by the UK authorities

- have powers 'to receive complaints from Union citizens and their family members for the purposes of conducting such inquiries'[9]

Figure 2: Supervisory arrangements after Brexit



Source: Institute for Government analysis

- 'have the right, following such complaints, to bring a legal action before a competent court or tribunal in the United Kingdom in an appropriate judicial procedure with a view to seeking adequate remedy.' (Although the independent monitoring authority will have the power to bring cases before the domestic courts rather than the ECJ, for a period of eight years UK courts will be able to refer cases for a preliminary ruling from the ECJ where they want more clarity on the proper interpretation of EU law.)[10]

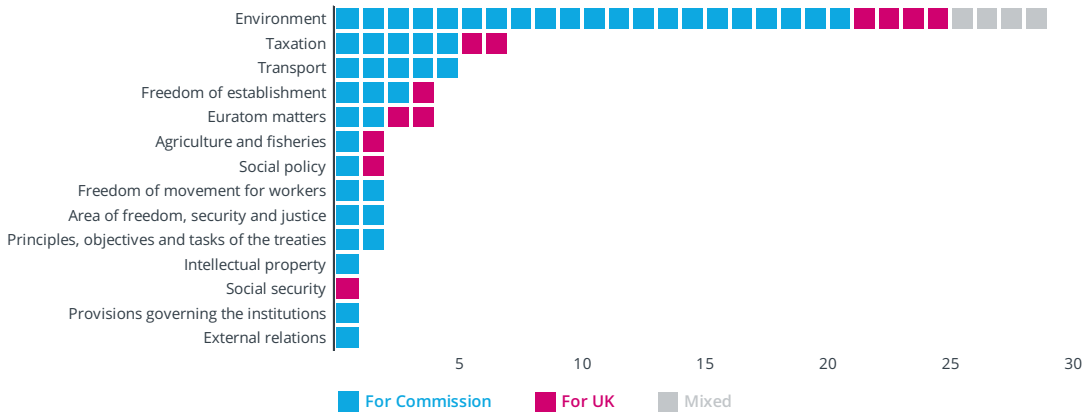
As Article 152 of the draft Withdrawal Agreement states:

> 'The Commission and the Authority shall each inform annually the specialised Committee on citizens' rights on the implementation and application of Part Two [on citizens' rights] in the Union, and in the United Kingdom respectively. This information shall, in particular, cover measures taken to implement or comply with Part Two and the number and nature of complaints received.'[11]

Environmental protection

Another specific proposal which the Government has made in relation to supervision, partly in response to domestic concerns about the loss of the Commission's enforcement role on environmental policy, is to create a new environmental watchdog for England. The reason for non-governmental organisations' concern is clear: to date, environmental infringement cases have been the most likely to end up in court, and the Government has lost in three out of four cases (see Figure 3).[12]

Figure 3: Commission v. UK–ECJ judgments by subject matter, 2003–2016



Source: Institute for Government analysis of judgments retrieved from InfoCuria, a database of the case law of the European Court of Justice

Recently, the Department for Environment, Food and Rural Affairs (Defra) concluded a consultation on how to constitute this authority, and what powers to give it.[13] However, the design of this watchdog has been controversial. Michael Gove, the Environment Secretary, first suggested creating the watchdog in October 2017; since then, he has reportedly clashed with ministerial colleagues over the design of the body. Some are said to have raised objections to binding businesses in 'red tape',

while the Treasury is said to have resisted initial suggestions that the body might have power to issue fines on other parts of the Government.[14] The consultation proposed an England-only body, but noted that 'the environment does not respect boundaries',[15] and that the Government would 'welcome the opportunity to co-design the proposals for the new environmental body and principles'[16] with the devolved administrations.

Recently, the Government released a set of slides on 'open and fair competition', with further detail on its proposals for the environmental watchdog. It said that the body will:

- be accountable to Parliament
- provide impartial advice and recommendations to the Government on its implementation of environmental legislation
- be able to receive and investigate complaints from members of the public on the Government's delivery and application of environmental law
- investigate complaints and take proportionate enforcement action, including legal proceedings if needed.[17]

These proposals are broadly in line with the recommendations of Parliament's Environmental Audit Committee, which has argued that the body should, at a minimum, be given powers equivalent to those of the EU institutions. However, the Environmental Audit Committee also said that the body should have 'the power to fine government departments and agencies that fail to comply', which does not appear in government proposals.[18]

State aid

The Government has indicated that it will change the Competition and Markets Authority's remit, giving it competence to make decisions on competition and state aid that are currently made by the European Commission.[19] The Government has said that the Competition and Markets Authority will have 'a full suite of enforcement powers, similar to those of the Commission, including the power to open investigations and seek further information'.[20]

Highly regulated sectors

The July white paper signals that the Government is aware of the need for market surveillance systems for particular sectors. Market surveillance is distinct from the areas discussed above, as it involves direct supervision of businesses, rather than supervision of public bodies. The Government is suggesting a mixed approach, with domestic supervision of some sectors and ongoing EU supervision of others.

In the area of agri-food (the agricultural production of food), the Government has:

- promised to 'maintain its robust programme of risk-based market surveillance to ensure that dangerous products do not reach consumers'[21]
- proposed 'establishing cooperation arrangements with EU regulators'[22]
- requested access to a number of EU databases which assist supervisory authorities.*

Similarly, in the area of financial services, the white paper contains broad commitments to regulatory dialogue and supervisory co-operation, including 'reciprocal participation in supervisory colleges'[23] – co-ordination structures that bring together regulatory authorities.

In addition, the Government has proposed that the 'common rulebook' be 'supplemented by continued UK participation in agencies for highly regulated sectors including for medicines, chemicals and aerospace.'[24] These agencies have a range of important supervisory functions, from direct authorisations of products, to information gathering and sharing of best practice among a network of regulators. The UK has asked to 'participate' in those EU agencies that have a more direct role, in order to avoid duplication of authorisations.[25] So in these areas, the Government is proposing that supervisory arrangements continue largely as now.

So far, the Government's approach has been to look at supervision and surveillance on a case-by-case basis, but with little detail as to how these individual arrangements fit into a larger framework. The Government will need to come forward with a more comprehensive proposal. To do this, it needs to answer the seven questions set out below.

* At the same time it is worth noting that in 2017 the Food Standards Agency published proposals that would mean a major change to the inspection system post-Brexit. Far from maintaining the current system, the Centre for Food Policy (see below) argued that these would lead to a weakening of official oversight of food businesses, and undermine public health. Lang T and Millstone E, 2018, *Weakening UK Food Law Enforcement: A risky tactic in Brexit*, http://foodresearch.org.uk/publications/weakening-uk-food-law-enforcement/

3. Questions to answer

1. Does the UK want its compliance to be supervised by EU, European Free Trade Association or UK institutions?

At the moment, the UK's compliance with its EU obligations is supervised by the European Commission and its agencies. In theory, this could continue – although the UK would no longer have a commissioner or any staff in the Commission. The EU–Ukraine Association Agreement provides for some supervision of this kind. The Commission is responsible for monitoring the process of Ukraine 'approximating' its own laws to the EU *acquis*, and Ukrainian officials must submit regular progress reports to the Commission for this assessment to take place.[1] The Commission can refuse to grant internal market status if approximation is deemed insufficient.

Similarly, Switzerland is supervised by the Commission in some areas such as data. The Commission evaluates the Swiss regime every three years and, ultimately, can suspend or revoke its 'adequacy' decision, a unilateral verdict by the Commission on whether Swiss law is up to scratch.[2]

Another option would be for the UK to 'dock' to the EFTA Surveillance Authority

Direct supervision by the Commission is also the arrangement envisaged for the transition period to December 2020 in the current draft of the Withdrawal Agreement and, as discussed above, supervision by some EU agencies is the Government's preferred approach for certain highly regulated sectors.[3] However, supervision by the Commission across the board looks politically unpalatable as a long-term approach for the future relationship.

Therefore, another option would be for the UK to 'dock' to the European Free Trade Association (EFTA) Surveillance Authority (ESA), which supervises compliance with the European Economic Area (EEA) Agreement by the EEA–EFTA states: Norway, Iceland and Liechtenstein. It is based in Brussels and, aside from the Commission, is the biggest single repository of expertise on the law of the Single Market.

The EFTA Surveillance Authority is part of the ecosystem of European enforcement, and could be a draw for any British people currently working in the European Commission (provided that the EEA countries waive the current requirement that EFTA Surveillance Authority employees be EEA nationals). Although the UK government has indicated that it does not expect the UK to continue to be an EEA state or to join EFTA, the UK could still attempt to make use of the authority – perhaps reconstituted as a joint UK–EFTA surveillance authority – to supervise the UK's application of its own agreement with the EU. The EU has suggested a similar approach to the Swiss in the past, although Berne has resisted this, and it remains unclear how the Swiss–EU impasse on future institutional relations will be resolved.[4]

Naturally, docking to the ESA would require agreement from the EEA–EFTA states, along with the EU27. Even if this is not the Government's preferred option for the long term, it may be the most feasible stopgap from January 2021, as there is not much time to build up institutional infrastructure and accumulate expertise elsewhere.

Alternatively, the UK could propose that the UK and EU build a secretariat to support the work of the Joint Committee and governing body, enabling a joint staff to supervise with treaty obligations. However, there would be some difficulties with this approach. First, although the Joint Committee could supervise the UK's compliance with its 'common rulebook' obligations, it would make little sense for the committee to do the same for EU member states, where the European Commission is already doing precisely that job. Therefore, the body would need a joint decision-making structure, but with responsibilities largely limited to the UK. Even then, the EU27 may resist any institutional design that makes the UK and the EU look like 'equal partners', or on an equal footing to one another. The EU's basic mantra is likely to be that if the agreement is to be supervised by any supranational institutions, they will be EU or EFTA institutions.*

Even if the UK wants to accept supranational oversight for some types of supervision, such as the supervision of transposition, in many areas it seems likely that the Government will want supervisory functions to move from EU to the domestic level. In that case, the UK will need to build its own supervisory institution or institutions, establishing some public authorities at national and devolved level to monitor compliance. This approach would be most obviously compatible with the desire to 'take back control', but as we discuss under the questions below, it presents a number of challenges.

2. Does the UK want to establish a single, central authority to keep tabs on government bodies' compliance, or rely on a more decentralised network of specialised supervisory bodies?

At the moment, supervision of UK government bodies' compliance with EU law is centralised in the Commission, which is responsible for monitoring the UK's compliance in all areas of EU law and overseeing the work of national and devolved regulators in the UK. Supervision is also largely centralised for EEA members – Norway, Iceland and Liechtenstein – through the EFTA Surveillance Authority (although the recent expansion of EU agencies has made supervision in the EFTA states more complex).

The UK and EU could agree to take a similar approach, setting up a dedicated new UK supervisory authority to monitor compliance with the UK–EU treaty in the UK and oversee domestic implementation and enforcement.

Alternatively, the UK could adopt a more decentralised approach. This would involve changing the remit, powers and governance of regulators and watchdogs which already have an oversight role in particular areas, while creating new bodies in other areas, and in some cases allocating new powers and obligations to government departments and the devolved administrations.

* The supervision of incorporation and transposition may be an exception to this, as discussed below.

The objective would be to ensure that the present functions of the Commission and its agencies are redistributed across the UK government. So far, this appears to be the Government's favoured approach. The Government could then establish a co-ordinating council to bring together those regulators whose remit is relevant to the UK–EU agreement for occasional dialogue. That council could cover both UK government bodies and those at devolved level.

A single oversight body would have some advantages, as follows.

Coverage
A centralised authority with a catch-all remit would reduce the risk of issues falling through an enforcement gap.

A clear counterpart to the Commission
A single authority would be the Commission's clear counterpart, able to act as a single point of contact and to elevate issues to the Joint Committee, as necessary.

Continuity for existing authorities
Existing public bodies with a regulatory function could continue, to a great extent, with business as usual, but reporting to the UK supervisory authority rather than EU bodies. That would probably allow them to discharge their duties more effectively than if they were to undergo an overhaul in governance or powers.

Additional assurance
If the UK does not create a UK supervisory authority, but does not want to be supervised by the Commission and EU agencies, then it is effectively proposing to remove a layer of oversight. In this case, some public bodies that previously came under the EU institutions' remit would not come under anyone else's remit. This would deprive the EU of some assurance that the agreement would be effectively enforced.

A one-stop shop
Concentrating supervisory activity in one institution would ensure clear accountability for enforcement and that processes for monitoring are coherent, and collect expert know-how on surveillance in one place.

A neutral mechanism for ensuring devolved administration compliance
Where powers were devolved, a UK supervisory authority would provide a neutral forum for oversight of devolved compliance, rather than leaving disagreements about oversight and enforcement to be negotiated informally between the constituent governments.

However, there would be significant challenges as well.

Appointment and accountability
Who would appoint the overseers, and to whom would they be accountable? A multinational supervisory agency (such as the EFTA Surveillance Authority) is very different from one that would be predominantly staffed by UK citizens, and whose leadership would be appointed by a UK decision maker, most likely a minister.

This would still be true even if the Scottish, Welsh and Northern Irish governments were to have a role in the appointments process.

Disruption
Establishing a single UK supervisory authority would be a major administrative exercise, with significant long-term ramifications for governance. Its design would be high-stakes and consume a lot of political and bureaucratic energy.

Cost
Inevitably, there would be additional cost and bureaucracy from creating an additional layer of oversight, which the Government would have to weigh against the potential benefits in terms of market access.

Expertise
A small and new UK supervisory authority could be easily outgunned by the domestic bodies that it was overseeing, and by the Commission on the EU side. If all the subject-matter experts were in other institutions, including the institutions that the authority is supposed to be taking enforcement action against, it could struggle to perform its functions effectively.

3. How can the Government ensure that domestic supervisory authorities are able to hold government to account effectively?

Whether the Government opts for a centralised authority or not, it is going to have to ensure that the arm's-length bodies to whom it entrusts supervision can effectively and independently exercise an oversight function over ministers and officials within central government. This is difficult. If control of the supervisory authority is too close to ministers, then it will not be independent enough to do its job properly. If control is too distant from ministers, then the authority may be seen as lacking political accountability.[5]

Nonetheless, there are some examples of bodies which already have enforcement powers against government. For example, the Equality and Human Rights Commission is tasked with monitoring the Government's compliance with equality and human rights' obligations, and can take action when government bodies fail to comply. It has powers of enforcement against central and local government, along with their arms-length bodies. The Information Commissioner's Office (ICO) can also take enforcement action against government, when the Government improperly holds or processes personal data.

As the Institute for Government has argued previously, successive governments have failed to develop a coherent approach to arm's-length governance, so there is no readily available model which the Government can use to meet the new requirements.* Therefore, the Government needs to consider the following.

* Gash T, Magee I, Rutter J and Smith N, *Read before Burning: Arm's length government for a new administration*, Institute for Government, 2010, www.instituteforgovernment.org.uk/sites/default/files/publications/Read%20before%20burning.pdf. In this we set out a new way of classifying arm's-length bodies which would create a new class of independent 'public interest bodies' that would include watchdogs and regulators.

Resourcing

What guarantees are there that the budget of arm's-length bodies will be – and continue to be – set at a level that allows the body to perform its functions effectively? The EU has already expressed concerns about the level of resourcing of some functions, such as customs, in the UK.[6]

Appointments

How independent is the process for appointment and dismissal of the chairs, board and chief executive?

The Exiting the European Union Committee has proposed that Parliament has a role in appointments to the independent monitoring authority, in order to shore up the body's independence from ministers – noting that 'the Treasury Select Committee has a statutory veto over the appointment and dismissal of the Chair of the Office for Budgetary Responsibility'. This is not replicated for other arm's-length body appointments, where select committees have at most an advisory function.[7]

Powers

Any supervisory body would need effective powers, if it is to substitute for the Commission. A body could be given powers such as:

- reporting on compliance to the Joint Committee
- demanding information
- responding to individual complaints
- opening investigations on its own initiative
- intervening in legal proceedings
- instigating domestic judicial review proceedings
- issuing advisory notices, requiring a response from the Government
- issuing binding notices, requiring action from the Government and enforceable by the courts
- levying fines.

The power to respond to individual complaints is likely to be particularly sensitive. It would make a body more responsive to breaches, and would make it easier for individuals and businesses to enforce their rights. However, such a power could also make the body more of an irritant to the Government, and put it at greater risk of underresourcing or abolition by frustrated ministers, creating the need for more resources. Moreover, the Government would need to consider who is eligible to complain: would it just be British citizens and businesses, or EU ones too?

Accountability

Most arm's-length bodies are accountable to ministers, who in turn are accountable to Parliament. Even so-called non-ministerial departments are accountable to Parliament through ministers, although their chairs and chief executives may be summoned to select committee hearings.[8]

The Environment Audit Committee has proposed that the new environmental watchdog is made accountable to Parliament, like the National Audit Office (NAO). This would mean that ministers exercise less control over the appointment of the body's leadership, and that rather than competing with other departments for resources from the Treasury, it would have its budget line voted on directly by Parliament. This could be an effective way to make bodies independent of ministers, while still ensuring political accountability.

Geographical coverage

The EU will want assurance about compliance across the UK. Many of the areas where rules are being repatriated from the EU are devolved and administered by the devolved administrations within the EU framework.[9]

At present, the UK government has agreed that there are a number of areas where there will need to be either legislative or non-legislative UK-wide frameworks, but those proposals pre-dated proposals for a 'common rulebook'. For areas within the 'common rulebook', there will be no need for separate arrangements to ensure a UK-wide approach, but there will still need to be effective enforcement either from UK-wide or devolved bodies.

If there were a centralised authority, any devolved bodies would come under its supervision. For areas where there is scope to diverge – for example, on some environmental protection – there would need to be a mechanism to ensure that all competent governments within the UK adequately meet the UK's international commitments. If there were separate enforcement bodies within the UK, they would need to co-ordinate and co-operate.

Abolition

The body could also be at risk of abolition. Successive UK governments have made and unmade arm's-length bodies to oversee government functions. Parliament can abolish any body that it has created, and the threat of abolition itself is a potential risk to independent enforcement against government.[10]

Therefore, the Government will need to find a way of protecting bodies that supervise its compliance with the agreement. For example, the UK could undertake an obligation in the future relationship treaty to establish, maintain and adequately resource such supervisory bodies. In that case, if Parliament were to abolish the bodies, the EU could open a dispute and the UK would be found to be in breach of its legal obligations. Gentler forms of entrenchment – for example, by providing in legislation that the Government must take certain steps before abolishing or modifying the supervisory authorities – may be possible, too, albeit weaker.

Box 1: Supervisory bodies – precedents

Office for Budget Responsibility

The Office for Budget Responsibility (OBR) was established in shadow form in 2010, then placed on a statutory footing in 2011.[11] It is a Crown non-departmental public body sponsored by the Treasury, with two principal responsibilities:

- to provide 'at least two' official forecasts a year (previously a responsibility of the Treasury), and assess whether the Government is on track to meet its fiscal objectives

- to look at the accuracy of past forecasts and assess long-run fiscal sustainability.*[12]

The last two assessments are laid before Parliament. The Act gives the OBR a 'right of access' to all government information that it requires to perform its functions. The chair and two members of the Budget Responsibility Committee are appointed by the Chancellor, but both their appointment and any decision to dismiss them need to be approved by the Treasury Select Committee.

There is also a non-executive oversight board, appointed by the Chancellor. The board needs to report to Parliament once a year on the OBR's discharge of its functions. In order to underline its independent status, the OBR has its own budget line (non-departmental public bodies normally simply receive grants-in-aid from their department).

Committee on Climate Change

The Committee on Climate Change was created in the Climate Change Act 2008 to oversee the Government's delivery of its statutory objectives of reducing UK carbon emissions by 80% by 2050.[13] The Committee is an executive non-departmental public body of the department charged with responsibility for the delivery of the UK's climate change mitigation objectives (currently the Department for Business, Energy and Industrial Strategy).

The Committee reports to Parliament on government progress in meeting its emissions reductions targets (it can advise also on the overall target), and recommends future 'carbon budgets' for five-year periods to meet the long-term objective. The Committee must publish its advice as soon as possible after it sends the advice to the UK government and the devolved administrations. The Government is obliged to respond to Parliament after consulting those administrations.

* The OBR's ways of working are set out in a non-binding memorandum of understanding with other key government departments (HM Treasury, Department for Work and Pensions and HM Revenue and Customs).

The chair is appointed by the national authorities – in practice the relevant UK Secretary of State and devolved counterparts – and they appoint the board members after consulting the chair. The board appoints the CEO but needs approval from the national authorities.

Although the Climate Change Committee was established with considerable cross-party support, there are questions surrounding its power to bring government into line, as reported by an interviewee in an earlier Institute for Government report: "The Climate Change Committee can say every year 'you're off track, you need to raise your game, there needs to be a step change', as they have done for the last seven reports. But it doesn't make any political impact; there's no pain in avoiding having stronger delivery policies."[14]

National Audit Office

The NAO is a statutory body, established in its current incarnation under the Budget Responsibility and National Audit Act 2011. It reports to the Public Accounts Committee, a cross-party group of MPs, and is audited and overseen by the Public Accounts Commission, another cross-party group of MPs.

The NAO audits the financial statements of public bodies, including all central government departments, and conducts 'value for money' audits to look at the efficiency and effectiveness of public expenditure. It has rights of access to documents and staff, but beyond that its powers are not coercive.

The NAO's budget is voted on directly by Parliament. Its chair and chief executive are proposed by the Prime Minister with the agreement of the chair of the Public Accounts Committee, and approved by Parliament.

Equality and Human Rights Commission

The Commission is a non-departmental public body, established under the Equality Act 2006, to uphold equality and human rights in England and Wales. The Commission is sponsored by the Government Equalities Office, which is currently part of the Department for International Development but moves around Whitehall following the ministerial holder of the equalities brief.

The Commission can carry out investigations into any organisation, public or private, concerning its compliance with equality obligations, although it does not have equivalent powers for human rights. In the equality sphere the Commission can demand information and, if it concludes that a breach has taken place, can issue an unlawful act notice enforceable by the courts, setting out the actions to be taken.

In addition, the Commission can respond to complaints from individuals, although it does not have the resources to give much attention to individual cases. In both equality and human rights spheres, it can bring judicial reviews against public bodies (which it does rarely), and intervene in legal proceedings (which it does more often).

The Commission's CEO is appointed by the board, subject to the consent of the sponsoring Secretary of State. The appointment of commissioners, by contrast, is the responsibility the Secretary of State, albeit with some input from the Commission. The Secretary of State of the sponsoring department selects the chair, who is then the subject of an advisory hearing of the Joint Committee on Human Rights and the Women and Equalities Select Committee in Parliament.

Parliamentary and Health Service Ombudsman

The Parliamentary and Health Service Ombudsman makes final decisions on complaints which have not been resolved by the NHS in England, UK government departments and other UK public organisations.

The Ombudsman acts in two statutory capacities:

- the Parliamentary Ombudsman deals with complaints against government departments (including the Department for Environment, Food and Rural Affairs and its arm's-length bodies) and certain other public bodies

- the Health Service Ombudsman investigates complaints against health service bodies.

The Ombudsman is appointed by the Crown on the recommendation of the Prime Minister, and is accountable to Parliament.

The Ombudsman can launch an investigation only where a complaint meets certain conditions. If it finds that a complainant has suffered injustice through maladministration, it can recommend action to put things right including fines, although it cannot compel an authority to comply. In the rare event of non-compliance, the body can issue a report to the Public Administration and Constitutional Affairs Committee.

Information Commissioner's Office

The ICO is a non-departmental public body responsible for upholding information rights. It covers the implementation and monitoring of a number of acts, including the Data Protection Act 2018 and the Freedom of Information Act 2000. It is now sponsored by the Department for Digital, Culture, Media and Sport, although it was previously sponsored by the Ministry of Justice.

The ICO has a number of powers which allow it to supervise authorities or public sector bodies in their compliance with the legislation or codes of practice. For example, it can:

- conduct assessments to check that organisations are complying with the relevant act

- serve information notices requiring organisations to provide it with information

- issue monetary penalties of up to 20 million euros to those who have broken the law
- prosecute those who commit criminal offences under information law.

4. How will the UK provide assurances to the EU that the UK government is not 'marking its own homework'?

The EU will want assurances that any bodies performing an oversight function, whether a UK supervisory authority or individual domestic bodies, are applying the rules in the same way as the Commission does to EU member states. In other words, they will want to ensure that common rules are genuinely common.

There are a number of ways in which this could be achieved, listed below with increasing levels of EU intrusiveness.

Confidence building

Informal links between supervisory bodies, such as secondment programmes for officials, would help to build trust.

Duties under Protocol 23

Supervisory authorities on both sides could be under obligations to share information and case files with each other if asked, work together on investigations affecting both sides, and open investigations on the basis of a request by the other side. Such a provision is made in Protocol 23 of the EEA Agreement.

In the EEA these duties are supported by Article 109 of the EEA Agreement, which states that 'the EFTA Surveillance Authority and the EC Commission shall cooperate, exchange information and consult each other on surveillance policy issues and individual cases', and that each shall 'pass to the other body any complaints which fall within the competence of that body'.[15] The UK–EU agreement could contain similar commitments. As these duties would be reciprocal, they would be beneficial to the UK and the UK business community, as they would impose some obligations on EU institutions to enforce UK interests.[16]

Duty of loyal co-operation

Article 3 of the EEA Agreement imposes a duty on contracting parties to 'take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement', and in particular to 'facilitate cooperation within the framework of this Agreement'.[17] Sometimes, this is called the 'duty of loyal co-operation', obliging supervisory authorities on both sides to work together in order to ensure that the Single Market functions well.

Although this sounds like aspirational language, it has been found to be an important base for co-operation between national competent authorities in different EEA member states. Again, such obligations would be reciprocal.

Regular reporting to Joint Committee

Supervisory authorities could be asked to provide regular information to the Joint Committee on their activities. This could be both on request, if a specific issue were to arise in the Joint Committee, and via regular reports on the functioning of the surveillance regime as a whole. Both the European Commission and any UK supervisory authorities could undertake such obligations.

EU observer on board

The UK could allow the EU to appoint an observer to attend board meetings of any supervisory body, which would give the EU27 some role in oversight. The extent to which this offered the EU assurances would depend on the extent to which the board is involved in operational decision making and strategy. This varies from public authority to public authority. There would have to be clear agreement on the speaking rights of the EU representative, when they could be excluded from conversations (if ever), and what information they could share with EU institutions or member states.

If the EU were allowed to send an observer to board meetings of a centralised UK supervisory authority, this probably would be asymmetrical: the UK is unlikely to be given any analogous role in the European Commission. However, the UK may be able to appoint observers to sit on the boards of some EU agencies, as the EFTA states can. Norway, for example, sits on the management board of the European Aviation Safety Agency, the European Chemicals Agency, European Medicines Agency and various other advisory agencies.

Decision-making role for Joint Committee

In the EFTA Surveillance Authority, technical work is done by officials, but supervisory decisions – such as whether to open an investigation – are taken by a college of EEA–EFTA state appointees, similar to commissioners in the European Commission. If the UK wanted to adopt a centralised approach and create a 'UK supervisory authority', the analogous approach would be to have a decision-making body comprising only UK representatives. However, the UK could seek to offer the EU greater assurance by departing from this precedent and giving the Joint Committee that decision-making role instead. The UK supervisory authority could conduct technical work, but when a decision on whether to open an investigation or whether to act on complaints is needed, it could be raised to a subcommittee of the Joint Committee, composed of EU and UK members.

This system would be difficult to design. In the EFTA Surveillance Authority college, if unanimity is not reached, decisions are taken by simple majority of the three college members (from Iceland, Liechtenstein and Norway). If, in the UK case, decisions were taken by a UK–EU Joint Committee, comprising two parties with equal representation, there would be no such option. Most likely, there would have to be a rotating chair for tiebreak decisions.

Additionally, such a measure would not be reciprocal. On the EU side, enforcement decisions will always be taken by the European Commission, not by the UK–EU Joint Committee. Therefore, this system would give the EU a bigger say in UK enforcement than the UK had in EU enforcement.

5. What are the supervisory arrangements for commitments outside the 'common rulebook'?

At the moment, the Government is proposing harmonisation only for a subset of the *acquis*: regulations on goods where compliance is checked at the border, and state aid. However, the Prime Minister's proposal for the future economic partnership covers many other areas of co-operation too.

Supervisory arrangements will be needed for the following.

Other commitments on goods

The Government has proposed that some rules on goods, such as rules on food labelling, should fall outside the 'common rulebook'. However, there may be some form of alignment with the EU regime in such areas which falls short of full harmonisation, such as equivalence. The Government needs to decide whether the application of those commitments should be supervised by the same institutions as the 'common rulebook', according to the same processes, or not.

Non-financial services

Although the Government has not proposed harmonisation on non-financial services, it has proposed some co-operation. The white paper states that the future relationship should include 'provisions for professional and business services, for example, permitting joint practice between UK and EU lawyers, and continued joint UK–EU ownership of accounting firms', along with extensive 'mutual recognition of professional qualifications'.[18]

In the first instance, any such agreements are likely to be managed by professional bodies and sector-specific regulators (such as the Bar Council, Solicitors Regulation Authority, chartered accountancy bodies and Financial Reporting Council). However, the Government needs to decide whether it would be appropriate to embed these agreements in the broader governance of the deal, supervised by the same institutions.

Financial services

The UK has suggested that in financial services, the relationship should be based on the concept of equivalence. This means each side deciding whether the other side's regulations achieve comparable outcomes to its own. In itself, that does not require any governance: each side makes equivalence decisions on the basis of its own processes, governed by its own laws and institutions. However, the UK also has proposed that the equivalence regime is 'enhanced', with various protections against either side unfairly or hastily withdrawing equivalence, set out in a bilateral treaty.[19]

These commitments, the Government has said, should be embedded within the wider governance framework for the agreement. The Government's proposals on financial services repeatedly make the case at a high level for 'supervisory co-operation', but the Government has not yet gone into detail about what the roles and powers of UK and EU supervisory authorities will be as far as the bilateral commitments are concerned, and how they will fit into the dispute resolution mechanism.

Thematic co-operation

The UK has proposed various forms of cross-cutting co-operation, including agreements on data protection, science and innovation, and the security of sensitive information. Again, there are different ways of organising the supervision of such agreements.

In the area of data protection, for example, third (non-EEA) countries' data regimes are assessed by the European Commission, which issues an adequacy decision if the country's rules are up to scratch, allowing personal data to flow freely from the EU to those countries.

However, Norway, Iceland and Liechtenstein have not had to apply for a data adequacy decision, as the EU's data protection laws are within the scope of the EEA Agreement, and so those states' compliance is supervised by the EFTA Surveillance Authority and enforced by the EFTA Court instead. The Government's white paper states that 'the EU's adequacy framework provides the right starting point'[20] for future co-operation in data but, as in financial services, suggests 'going beyond' that framework with certain enhancements. Therefore, the question arises as to whether co-operation will be supervised by the EU institutions, or according to the governance of the future relationship.

Level playing field

The EU wants to ensure the maintenance of a level playing field in areas such as environmental and social protection, competition and state aid, and corporate taxation. In the area of state aid, the UK has proposed ongoing harmonisation, while in the areas of environmental protections and labour standards, the UK has committed to 'non-regression' – which, in broad terms, means that it will not lower its standards after Brexit.

Historically, non-regression clauses have been difficult to enforce, but the UK has said that it will 'go further in terms of governance' than any precedents. The Government has begun to explain what this means. It has said that non-regression clauses will be subject to dispute resolution, and sketched out the systems for domestic oversight in each area.[21] As the negotiation proceeds, it will be important to establish how any supervisory authorities might judge compliance with non-regression clauses.

6. Will the same arrangements apply to supervision of transposition as to supervision of application?

Most of the discussion in this paper has focused on the supervision of the application of rules. However, the UK also needs to explain how it proposes to give the EU confidence that it is putting the right rules on its statute book in the first place.

Therefore, our final two questions relate to the supervision of legislators rather than government bodies. Some institution will be tasked with monitoring the UK's implementation of its treaty obligations in domestic legislation – at present, a role played by the European Commission for EU Member States, and by the EFTA Surveillance Authority for the EEA–EFTA states.

This function could become more important after Brexit. At the moment, a lot of EU rules, including all EU regulations, are directly applicable in the UK. This means that they become part of the UK's domestic law without Parliament needing to do anything. Only EU law without direct applicability, such as directives, requires 'transposition' or 'implementation' by Parliament. However, the Government's white paper does not differentiate between directly applicable and non-directly applicable law, stating only that 'if the Joint Committee had agreed to adopt a rule change', then 'the UK Parliament would be notified with an explanatory memorandum ahead of any domestic legislative proposals coming forward', and that 'the UK Parliament could ultimately decide not to pass the legislation'.[22] This implies that domestic processes for the transposition of treaty obligations into domestic law may apply in future to rules that are directly applicable in the EU, even though those rules require no transposition by member states. That would make the arrangements for supervising the transposition process all the more sensitive. Where powers are devolved, the devolved legislatures may need to undertake transposition too.

Clearly, it would be impossible to ask a network of regulators in a decentralised model to perform this supervisory function. There would have to be an additional piece of machinery. It might be possible to task a UK supervisory authority with this role, but it is unlikely that such an authority would have coercive powers: it would be constitutionally unusual for a government body to be able to compel a sovereign Parliament to pass a certain law if it did not want to do so.

Therefore, a UK supervisory authority's powers to supervise transposition probably would be limited to reporting on Parliament's progress to the Joint Committee. Coercive measures to deal with non-incorporation could then be initiated through the dispute resolution mechanism, if the EU believed that the UK had failed to meet its obligations.

If there were no UK supervisory authority, or if the UK did not want it to be involved in the supervision of transposition, an alternative would be to ask the European Commission to carry on monitoring the UK's transposition of its treaty obligations. The Commission could then report to the Joint Committee where it believed that Parliament – or the devolved legislatures – had failed to transpose part of the 'common rulebook' into domestic law. Again, if disagreements were to persist in the Joint Committee, the EU would have recourse to the dispute resolution mechanism.

Alternatively, the Joint Committee itself could be tasked with the technical work of supervising the process of transposition. This would mean imbuing the Joint Committee with more institutional personality: it would not just be an institution that existed on paper, formed in practice when representatives of the UK and the EU meet periodically, but a standing bureaucracy with staff and resources contributed by both parties. As discussed under Question 1 above, the EU may resist proposals for permanent 'joint' institutions that appear to put the UK and EU on an equal footing.

7. Will the Government introduce extra elements of domestic assurance to stop Parliament from legislating in breach of the UK's obligations?

So far, we have discussed how the UK might ensure that the Government acts in a way consistent with the UK's obligations, and how the UK might ensure that Parliament passes the laws that it needs to in order for the UK to meet its obligations.

However, there is a further question: how will the UK ensure that Parliament does *not* pass laws that conflict with the UK's obligations under the future relationship treaty? The UK could argue that if Parliament were to pass such a law, the EU would have recourse to the dispute resolution mechanism, and so no further protection is required. Alternatively, the UK could offer some kind of domestic assurance by trying to elevate the status of UK–EU treaty law in its own legal system.

How will the UK ensure that Parliament does not pass laws that conflict with the UK's obligations under the future relationship treaty?

At present much EU law enjoys 'direct effect', meaning that individuals can rely on it in domestic courts. EU law also enjoys 'supremacy' in the UK, meaning that it takes precedence over any conflicting rules of domestic law.

The UK could attempt to mimic these features of EU law for any harmonised commitments in the future UK–EU relationship. The Government needs to consider whether it would be appropriate to try to impose constraints on future parliaments' freedom to pass laws which violate the UK's obligations under its treaties with the EU, or to repeal laws that it has passed in order to comply with those obligations.

This will be a particularly sensitive and important challenge for the supervision of any of the level playing-field provisions discussed under Question 5 above. For the UK to comply with the commitments that it has already suggested, it will have to find a way to ensure that domestic parliaments are not deregulating on environmental or labour standards by stealth – or indeed by accident.

There are more and less extreme ways of doing this. For example, Parliament could try to provide that where any future legislation conflicts with a rule of the future relationship treaty which has been incorporated into UK law, the courts are empowered or obliged to disapply the new domestic rule in favour of the treaty rule.

This would give the future relationship treaty status akin to 'supremacy' in domestic law, a similar approach to that adopted by some EEA states to give effect to their obligations under the EEA Agreement. Protocol 35 of the Agreement states that where there is conflict between a rule of national law, 'the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases'. Norway gave domestic effect to that rule in Article 2 of the Norwegian EEA Act (No 109/1992), which states that 'provisions of a statute which serve to fulfil Norway's obligations under the Agreement, shall in the event of conflict take precedence over other provisions governing the issue'.[23]

Alternatively, the Government could legislate to give the courts a slightly weaker power. The precedent of the Human Rights Act 1998, which incorporates the European Convention on Human Rights into domestic law, is instructive here. When a minister brings forward legislation in Parliament, or they must 'make a statement to the effect that in his view the provisions of the Bill are compatible' with the Convention rights, or 'make a statement to the effect that although he is unable to make a statement of compatibility, the Government nevertheless wishes the House to proceed with the Bill.'[24]

If the legislation is challenged in court as non-compliant with the Human Rights Act, then the courts cannot disapply it, but they can issue a 'declaration of incompatibility' – a non-binding statement meant to prompt Parliament to revisit the issue. The Government could introduce a similar system for the enforcement of obligations under the future relationship treaty. The Swiss already have a system whereby any new piece of federal legislation must be checked for its compatibility with EU law, and if it falls within the scope of one of Switzerland's sectoral agreements with the EU, the relevant department must show that the legislation is in line with that sectoral agreement.[25]

If the Government does legislate to give the courts the power or obligation to call into question the lawfulness of primary legislation, it needs to consider the role of any domestic supervisory authorities in that process. For example, if the courts were empowered to make a declaration that a piece of primary legislation passed by Parliament is incompatible with treaty obligations that the UK has incorporated into its law, the Government would need to decide whether it would be appropriate for the relevant supervisory authority to apply to the court for such a declaration, and in what circumstances private parties could have a right to do the same.

If these were felt to go too far, but the Government still wanted to provide a degree of constraint on future parliaments' ability to change the law, it could follow the model that it appears to be developing in order to meet its commitment to entrench the agreement on citizens' rights. The Government has promised that in addition to allowing citizens to enforce their rights under that agreement before the UK courts, any future Parliament that tries to repeal or amend the law on EU citizens' rights would have to go through an 'additional procedural step', beyond the normal legislative process, in order to do so[26] – although we have yet to see any concrete proposal for that additional step.

4. Conclusion

It is still not clear what form the future relationship between the UK and the EU will take. The Prime Minister's Chequers blueprint is being assaulted from all sides: domestically by those who believe that the plans would tie the UK too closely to EU rules and institutions in perpetuity, and in Europe by those who argue that to untie free movement of goods from free movement of services represents an unacceptable unravelling of the Single Market.

Whether the Chequers proposal lives or dies, supervision is likely to matter in the next phase of the negotiation

Yet whether the Chequers proposal lives or dies, supervision is likely to matter in the next phase of the negotiation. Any future relationship that involves some alignment with the rules of the EU – whether it looks like the Chequers proposal or not – will require robust processes for enforcement so that businesses and the EU can be confident that those rules are being honoured. This would be true of a softer Brexit, in which the UK accepted all four freedoms of the Single Market, and it would be also true of a so-called 'Canada plus plus plus' Brexit, where the pluses involve some obligations on the parties to align their domestic regulations in order to deepen or expand market access. The European Commission has said that even a trade deal based on Canada's agreement with the EU would have to incorporate some EU rules in level playing-field areas such as the environment. This means that both sides are proposing some degree of alignment, and so neither side can afford to duck difficult questions about how to design a supervisory regime.

Ultimately, the EU will look at the Government's proposals on supervision as a part of a wider system of governance, together with proposals on dispute resolution, the processes by which the UK proposes to incorporate new EU rules into the UK–EU agreement and UK law, and the system of remedies that would apply if anything goes wrong (those issues are outside the scope of this paper).

However, what is clear is that if the future relationship is going to involve deep market access based on regulatory integration, the EU will want to see that this overall system is robust, endowing supervisory institutions with the necessary powers, resources and mechanisms of accountability to perform their functions. This is equally true of any regulatory alignment in the Withdrawal Agreement and, in particular, of the Irish backstop, which is likely to provide for some Northern Ireland-wide or United Kingdom-wide alignment with the rules of the Single Market.

Therefore, the Government needs to start thinking about supervision more systematically, and fill the gap in its plans for the future.

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