

British-European Relations Post-Brexit: A Legal Kaleidoscope



21 September 2020

Healthcare Law

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Virtual workshop – British European Relations post-Brexit: A Legal Kaleidoscope

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Monday 21 September 2020

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Health care law is a [cross cutting field of EU law](#), so many of the things that we've heard about today across the whole workshop apply to some aspect or other of [Brexit](#) and [post-Brexit](#) healthcare law.

Products used in health care systems – like the personal protective equipment that because so critical in March 2020, or the hoped-for eventual vaccine for COVID-19 – will be affected by the trade relations between the UK and the EU, as well as the UK and the rest of the world.

The **staff** who work in the NHS – and in social care – will continue to include many EU citizens (there is currently an 8% vacancy rate in NHS England, which cannot be filled from domestic workforce alone). And their rights and those of their families will be determined by the Withdrawal Agreement (if they are within its scope) or by future EU-UK relations with the EU on human migration – recognition of qualifications – covered in the draft texts on the future EU-UK trade relationship – is a case in point.

Nowhere are these questions of movement of products, **services** and people more salient for health than on the island of Ireland, which has an integrated health workforce, where products cross the border freely (eg in ambulances), and where some aspects of health services are provided on an all-island basis.

The regulatory standards that surround biomedical developments – an area where the UK has been a leader in the European **Research** Area – will make a difference to which clinical trials involve UK partners – and hence UK patients; how data can be shared in cross-border health-related research and so on.

Public health standards – food safety, tobacco and alcohol rules, food labelling, air and water quality and so on – or 'non tariff barriers' in the language of trade law - will have a slow-acting but profound effect on health in the UK – and hence on the demands on the NHS and the levels of care the NHS can provide into the future.

And – taking a wider lens – impacts on GDP consequent on the UK's trading relationships with the EU imply a reduction in annually available public spending on the NHS.

I would argue that health has a particular salience when it comes to the broader interactions between the social, political and legal dimensions of the UK's future relationship with the EU

– as well as the UK’s internal constitutional settlement where [health is a devolved matter](#) and there are separate health care systems in England, Scotland, Northern Ireland and Wales. Even [Dominic Cummings himself](#) has suggested that the relatively narrow Leave vote was due in a significant measure to the 18 words emblazoned on the side of a bus, implying that to Leave the EU would mean £350 million a week more for the NHS. This implies that the legitimacy of the post-Brexit, post-transition legal order is dependent, in part, on what that (now near) future means for the NHS.

This salience probably makes it more difficult for aspects of the UK-EU relations to fall ‘under the political radar’ - to be subject to essentially technocratic decision-making where the logics of economic considerations push the UK towards close collaboration and cooperation – and indeed regulatory alignment – with the EU, its large and neighbourly trade partner. Pretty much every health sector actor we interviewed since 2016 would like continuity as near to EU membership as possible. This position is [reflected](#) in some low-salience aspects of the UK’s negotiating position – eg the UK’s proposed detailed rules on mutual acceptance of each other’s conformity assessments which would apply to medical devices. The UK even proposes continued access to the EU’s electronic information exchange systems for this purpose. Or, eg in the UK’s proposed annex on medicinal products, which seeks continued mutual recognition of pharmaceutical batch release control (this proposal is based on an EU-Israel agreement which involves Israel aligning with EU rules).

Another example is the rules under Part Two Title III of the Withdrawal Agreement (which concerns [coordination of social security](#), and is a part of the WA that continues for long after the end of 2020) as they apply to cross-border health care – will it be politically feasible for courts in the UK (or even in the EU) to interpret its scope provisions generously where they are unclear?

So much for a summary of some of the implications in the UK – there are also health implications for the EU. The ‘[Brexternalities](#)’ for health – ‘Brexternalities’ being external effects of Brexit imposed on those who did not have a choice over the decision to Leave the EU (see [Armstrong](#)) – will not fall evenly in the EU. They will fall more heavily on certain geographical areas, eg the south of Spain where many retired UK people live and access the Spanish NHS; or countries like Malta where all medicines are currently produced and labelled for the UK market; Central and Eastern Europe where many health care professionals have been in the UK for some or all of their professional lives because of the UK’s reputation for training and development in health care and biomedical science; and of course, above all, Ireland, where, as I’ve already stressed the health care system is significantly integrated with the Northern Irish healthcare system.

A final note, referring back to questions raised by Anand Menon in the first panel. Health care is also an important testing point for public debates in the UK about the roles of law and legal process, and the rule of law in the sense of holding government to account through legal process. While the popular narrative – eg judges as ‘enemies of the people’ or the [blog post](#) by Suella Braverman to the effect that unelected judges must be stripped of their powers – is that ‘law’ is not in the interests of ‘ordinary people’, our conversations with people in the street in ‘left behind’ places in Northern Ireland and the north of England suggest that, on the contrary, people are deeply distrustful of elected politicians, but that they do trust in law and

legal process. So that gives us – as lawyers and legal academics – some hope in terms of domestic discussions about the place and rule of law in EU-UK relations.

More information: [Health Governance after Brexit](#) @brexithealthlaw